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No. 07 -

IN THE

Supreme Court of the United States

RAJAH BAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Hobbs Act (18 U.S.C. § 1951(a)) prosecution of local robberies that have only a *de minimis* effect on interstate commerce is an unconstitutional exercise of federal power.

PARTIES TO THE PROCEEDING

Petitioner Rajah Baylor was defendant-appellant in the Court of Appeals.

Respondent United States of America was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit.

DECISION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at --- F.3d --- and is reprinted in the Appendix to the Petition ("App.") at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 26, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl.3, empowers Congress to "regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes."

The Hobbs Act, 18 U.S.C. § 1951(a), makes it unlawful to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion."

STATEMENT OF THE CASE

This petition presents the question whether, consistent with this Court's recent Commerce Clause jurisprudence, the federal government may prosecute under the Hobbs Act, 18 U.S.C. § 1951(a), local, small-scale robberies which have only a *de minimis* effect on interstate commerce. Petitioner Rajah Baylor was arrested by Cleveland police officers after he robbed a Cleveland-area Little Caesar's pizza

restaurant. For his theft of $538, petitioner was convicted of interfering with commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Petitioner was sentenced to approximately five years in prison for his Hobbs Act conviction.

The Sixth Circuit affirmed the conviction, concluding that petitioner's robbery could be prosecuted under the Hobbs Act, even though it had only a *de minimis* effect on interstate commerce. App. 9a. The majority below held that the *de minimis* standard satisfied constitutional requirements because individual instances of robbery could, through repetition, have a substantial effect on interstate commerce. App. 5a. Concurring, Judge Suhrheinrich recognized that he was bound by Sixth Circuit precedent, but expressed concern that those precedents are "inconsistent with the recent Supreme Court precedent, and more fundamentally, the doctrine of federalism." App. 10a (Suhrheinrich, J., concurring).

1. The Hobbs Act makes it a federal crime to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. § 1951(a). Originally enacted as an amendment to the Anti-Racketeering Act of June 18, 1934, Pub. L. No. 73-376, 48 Stat. 979-80 ("the 1934 Act"), the Hobbs Act was a response to this Court's holding in *United States v. Local 807, International Brotherhood of Teamsters*, 315 U.S. 521 (1942), that the extortion of out-of-state truck drivers by members of a New York City truck drivers union fell within an exception to the 1934 Act. *See United States v. Enmons*, 410 U.S.

396, 402-03 (1973); *see also United States v. McFarland*, 311 F.3d 376, 382 & n.14 (5th Cir. 2002) (en banc) (Garwood, J., dissenting from per curiam).

As explained by the House Committee on the Judiciary Report, the Hobbs Act was passed to "eliminate racketeering in relation to interstate commerce, of concern to the Nation as a whole. That statute came under examination of the Supreme Court in *United States v. Local 807* . . . ." H.R. Rep. No. 79-288, at 1-2 (1945). The Report's conclusion emphasized that Congress was concerned about the movement of goods in interstate commerce, explaining that "the Constitution . . . confers on [Congress] the exclusive and unlimite[d] power to regulate interstate commerce" and that "the members of the Constitutional Convention agreed that our Federal Government would be destroyed if barriers should be erected in any way to impede the free flow of interstate commerce." *Id.* at 10. Debate in the House echoed these concerns, and focused almost exclusively on the "interruption of commodity shipments actually moving in interstate commerce, principally agricultural commodities being carried by truck across state lines." *McFarland*, 311 F.3d at 385 (Garwood, J., dissenting from per curiam); *see also id.* at 385-87 & n.19.

2. In December 2005, Kevin Oliver, co-defendant in this case, planned a robbery of the Little Caesar's Pizza where he had worked in Cleveland, Ohio. Pursuant to that plan, petitioner broke into the restaurant just after closing and demanded that an employee open the safe. He then hit the employee with

a gun, and took approximately $538 before running out the back of the store.

Later that evening, Oliver and petitioner were picked up by the police and arrested. During petitioner's two-day trial, the owner of the Little Caesar's, Louis Archer, testified that he only ordered supplies from an in-state distributor, Blue Line Food Service Distribution in Columbus, Ohio. Pet. C.A. Br. at 1, 4-5. Joe Mestrovich of Blue Line Food Service Distribution testified that his company purchased the products for distribution to the individual Little Caesar's pizza stores from businesses out of state and that those products were then distributed from the company's Columbus warehouse. *Id.* at 4. This was the only evidence offered at trial of a connection between the local pizza restaurant and interstate commerce. Petitioner was convicted of interfering with commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and sentenced to 56 months of imprisonment.[1]

3. The Court of Appeals (Griffin, Sutton, Suhrheinrich, JJ.) affirmed petitioner's conviction. App. 9a. The panel began by noting that it had previously "reaffirmed [its pre-*United States v. Lopez*, 514 U.S. 549 (1995)] holdings that the government must prove only that a robbery had a *de minimis* effect on interstate commerce in order to satisfy the jurisdic-

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[1] Petitioner was also convicted of one count of using a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), for which he was sentenced to 84 months of imprisonment to be served consecutively to the sentence imposed on the Hobbs Act count. That conviction is not at issue here.

tional requirement of the Hobbs Act." App. 4a. The court adopted the Tenth Circuit's reasoning in *United States v. Bolton*, 68 F.3d 396, 398-99 (10th Cir. 1995), concluding that "if a statute regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." App. 5a (internal quotation marks omitted). The court further explained that it had subsequently reaffirmed the *de minimis* standard following this Court's decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005). Concluding that it was "bound by our prior published opinions," the court held that it "must reject Baylor's challenge to the *de minimis* standard." App. 7a (citing Sixth Cir. R. 206(c); *United States v. Humphrey*, 287 F.3d 422, 452 (6th Cir. 2002)).

Judge Suhrheinrich concurred. Although he considered himself bound to affirm the conviction because "the majority's decision is consistent with the law of this Circuit," he expressed the view that "those decisions are inconsistent with the recent Supreme Court precedent, and more fundamentally the doctrine of federalism." App. 10a. He explained that under *Lopez*, "regulated activity must substantially affect interstate commerce" to "fall within the scope of the Commerce Clause," and that *Morrison* had "expressly rejected an aggregation theory when regulating non economic activity." App. 10a. Thus, "[b]y continuing to allow a *de minimis* standard for individual violations of the Hobbs Act, [the court was] essentially nullifying the 'substantial effect' test of *Lopez* and *Morrison*." App. 10a-11a.

Judge Suhrheinrich also observed that the consequences of continuing to allow the *de minimis* standard would be significant: "[t]he effect of our Court's rulings is that every local robbery of a business in the United States is a federal crime." App. 11a. In Judge Suhrheinrich's view, this result could not be "what the Founding Fathers intended," and he explained that he had "harbored the hope that the Supreme Court in *Lopez* was seeking to restore a proper state-federal balance that gives actual meaning to the term federalism." App. 11a. He concluded by expressing the "hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*." App. 11a.

REASONS FOR GRANTING THE PETITION

This case presents an important question about the proper scope of federal power: whether the Constitution permits the federal government to prosecute an individual who commits a local robbery which has at most a *de minimis* effect on interstate commerce. The courts of appeals settled upon this *de minimis* standard at a point when the lower courts allowed the federal government virtually unlimited power to regulate. But in *United States v. Lopez*, this Court recognized that Congress' powers under the Commerce Clause, while broad, are not without limit. 514 U.S. 549, 556-57 (1995); *see also United States v. Morrison*, 529 U.S. 598, 608 (2000).

In the years since this Court decided *Lopez* and *Morrison*, there has been considerable confusion in the courts of appeals as they have attempted to apply these cases in the Hobbs Act context, and numerous courts of appeals judges have now called

upon this Court to resolve this confusion. During this time, four different approaches have emerged, producing uncertainty about the meaning of *Lopez* and *Morrison* and how those cases should be applied in the federal criminal context. Indeed, the two competing approaches adopted by the courts of appeals are in fundamental conflict with this Court's decisions in *Lopez* and *Morrison*, disrupting the proper federal-state balance and obliterating, in contravention of this Court's decisions, the distinction between "what is truly national and what is truly local." *See Morrison*, 529 U.S. at 617-18; *see also Lopez*, 514 U.S. at 557. The lower courts' attempts to reconcile their decisions with *Lopez* and *Morrison* reveal only that the continued application of the *de minimis* standard cannot be justified in light of the proper Commerce Clause analysis set out in those cases. Because of the confusion in the lower courts, and because of the conflict between the approaches adopted in the lower courts and this Court's Commerce Clause jurisprudence, this Court's review is warranted. This case presents a good vehicle for addressing the important question presented. This Court should grant review.

I. NUMEROUS COURTS OF APPEALS JUDGES HAVE CALLED UPON THIS COURT TO RESOLVE WHETHER THE *DE MINIMIS* STANDARD FOR HOBBS ACT VIOLATIONS IS CONSISTENT WITH *LOPEZ* AND *MORRISON*

It is well-established that our Constitution "created a Federal Government of limited powers." *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Thus,

while Congress may "regulate [c]ommerce . . . among the several [s]tates," U.S. Const. art. I, § 8, cl.3, there are "outer limits" to its authority to do so, *see United States v. Lopez*, 514 U.S. 549, 556-57 (1995); *see also United States v. Morrison*, 529 U.S. 598, 608 (2000) (Congress' "regulatory authority [under Commerce Clause] is not without effective bounds]"). In *Lopez*, this Court surveyed the history of its jurisprudence under the Commerce Clause and "identified three broad categories of activity that Congress may regulate under its commerce power": (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) those activities having a substantial relation to interstate commerce, *i.e.*, "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59; *see also Gonzales v. Raich*, 545 U.S. 1, 15-19 (2005); *Morrison*, 529 U.S. at 608-09. Turning to the third of those categories, this Court set out the proper analytical framework for determining the constitutionality of statutes intended to regulate conduct that substantially affects interstate commerce. *See Lopez*, 514 U.S. at 559-64. In *Morrison*, this Court reaffirmed *Lopez*'s analytical framework and made clear that "noneconomic, violent criminal conduct" cannot be regulated "based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 608-09, 617.

Despite this Court's guidance, first in *Lopez* and then in *Morrison*, there is considerable discord among judges on the courts of appeals as to how those cases should be applied in the context of con-

stitutional challenges to convictions under the Hobbs Act, and numerous courts of appeals judges have now called upon this Court to address this important question. In the years since *Lopez* was decided, every court of appeals has considered whether the *de minimis* standard remains constitutional following *Lopez*,[2] and in that time, at least four different views have emerged. Indeed, even those judges who have concluded that the *de minimis* standard remains appropriate are divided as to the appropriate analytical framework for assessing challenges to Hobbs Act convictions in light of *Lopez*.

Under one view, articulated most forcefully by eight Fifth Circuit court of appeals judges, application of the *de minimis* standard is in clear conflict with this Court's Commerce Clause jurisprudence and requires repudiation of that court's pre-*Lopez* precedents. *See United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc) (Garwood, J., dissenting from per curiam). In *McFarland*, the Fifth Circuit, by an equally divided en banc court, affirmed the defendant's conviction of four counts of

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[2] *See, e.g.*, *United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006); *United States v. Farrish*, 122 F.3d 146 (2d Cir. 1997); *United States v. Clausen*, 328 F.3d 708 (3d Cir. 2003); *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003); *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc); *United States v. Davis*, 473 F.3d 680 (6th Cir. 2007); *United States v. Peterson*, 236 F.3d 848 (7th Cir. 2001); *United States v. Dobbs*, 449 F.3d 904 (8th Cir. 2006); *United States v. Atcheson*, 94 F.3d 1237 (9th Cir. 1996); *United States v. Malone*, 222 F.3d 1286 (10th Cir. 2000); *United States v. Gray*, 260 F.3d 1267 (11th Cir. 2001); *United States v. Harrington*, 108 F.3d 1460 (D.C. Cir. 1997).

Hobbs Act robbery for robbing three convenience stores and a liquor store. In one of the robberies, the defendant had stolen "about $50." *Id.* at 377-78. Although the eight judges who voted to affirm the conviction provided no rationale for their decision, eight judges dissented, forcefully arguing that the Hobbs Act cannot be constitutionally applied to the robbery of local retail stores. Under their view, such activities are not the types of commercial activities properly regulated under the Commerce Clause. *Id.* at 396 ("'[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory'" (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring)). To hold otherwise, the dissenters concluded, "would, without adequate justification, bring within the scope of the Commerce Clause the proscription of local violent (and other) crimes not constituting the regulation of commercial activity, crimes prototypical of those that historically have been within the reserved police power of the states, contrary to the principle that the Commerce Clause is limited to matters that are truly national rather than truly local." *Id.* at 409-10 (emphasis omitted).

Similarly, in *United States v. Harrington*, 108 F.3d 1460 (D.C. Cir. 1997), Judge Sentelle dissented from his court's continued application of the *de minimis* standard. He explained that "[t]he Supreme Court's majority opinion in *Lopez*, especially in light of the concurring language of three justices"

led him "to believe that the United States' broad interpretation of the Hobbs Act robbery statute is directing us toward constitutionally dangerous ground." *Id.* at 1476. He further explained that a "'relatively trivial effect [if any] on commerce' should not be used as an excuse for the broad federalization of an otherwise state-governed crime." *Id.*

Under a second view, articulated by the court below and the Tenth Circuit, the *de minimis* standard remains constitutional because "if a statute regulates an activity which, through repetition, in [the] aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." App. 5a (internal quotation marks omitted); *see also United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (considering whether "the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce"). Under this view, the fact that the robbery of a local retail store is neither "economic" nor "commercial" in the sense that this Court has used those terms is immaterial to the analysis of whether the activity's effect on interstate commerce can be regulated.

Under a third view, the presence of a jurisdictional element in the Hobbs Act is critical, rendering *Lopez* and its substantial effects test inapplicable. *See, e.g.*, *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006) ("a statute with an express jurisdictional nexus to interstate commerce may be applied in circumstances where the actual connection to interstate commerce is small"); *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir. 1996) ("Be-

cause the Hobbs Act is concerned solely with *inter*state, rather than *intra*state, activities, we conclude that *Lopez*'s 'substantially affects' test is not applicable."). Thus, under this view, it is immaterial whether the activity, in aggregate, has a substantial effect on interstate commerce: Congress can change the required showing by inclusion of a jurisdictional element.

And, under a fourth view, the *de minimis* standard may well be unconstitutional, but circuit precedent forecloses abandoning it until this Court applies its decisions in *Lopez* and *Morrison* in the Hobbs Act context. Judge Torruella, for example, concurred in affirming the conviction of a robbery of an individual in his private residence even though he believed that the majority's "interpretation of the Hobbs Act . . . extends Congress' power to regulate interstate commerce beyond what is authorized by the Constitution." *United States v. Jimenez-Torres*, 435 F.3d 3, 13 (1st Cir. 2006) (Torruella, J., concurring). He explained his decision to concur: "[B]ecause precedent binds me until such time as the Supreme Court puts an end to the fictions that allow the apparently limitless aggrandizement of federal power into areas reserved to the states by the Constitution, I have no choice but to concur in the affirmance of [defendant's] conviction." *Id.* at 15; *cf. United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002) ("[The defendant] argues that *Lopez* effected far more of a sea change in the Supreme Court's Commerce Clause jurisprudence than we have been willing to acknowledge. . . . We are bound by the ample Seventh Circuit precedent on this point. If, indeed, *Lo-*

pez's rationale calls into doubt our construction and application of section 922(g)(1), it is for the Supreme Court to so hold.").

Similarly, in this case, Judge Suhrheinrich concurred because "the majority's decision is consistent with the law of this Circuit." App. 10a. He further explained, however, that this result conflicted with *Lopez* and *Morrison* and could not be "what the Founding Fathers intended." App. 11a. He thus expressed the "hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*." App. 11a.

Thus, a decade after this Court decided *Lopez*, there is fundamental disagreement among the courts of appeals as to how the test this Court set forth in *Lopez* should be applied in the Hobbs Act context. Because resolution of this issue is necessary, this Court's review is warranted.

II. THE *DE MINIMIS* STANDARD IS IN DIRECT CONFLICT WITH *LOPEZ* AND *MORRISON*

Judge Suhrheinrich expressed the hope that this Court would review the vitality of the *de minimis* standard post-*Lopez* because, in his view, that standard is in tension with both the federalism envisioned by the Founding Fathers and this Court's decisions in *Lopez* and *Morrison*. *See* App. 11a. Indeed, in those cases, this Court recognized that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 618. Allowing Congress to intrude into

this sphere of state sovereignty disturbs "one of the few principles that has been consistent since the Clause was adopted," that is, that there must be a "distinction between what is truly national and what is truly local." *Id.* at 617. The *de minimis* standard is in tension with this Court's decisions in *Lopez* and *Morrison* because it subjects virtually all theft to federal prosecution, blurring the line between the "truly national" and the "truly local." The courts of appeals' efforts to reconcile this tension simply make clear that the *de minimis* standard cannot survive the analytical framework set out in *Lopez*.

A. Under *Lopez* and *Morrison*, It Is Improper To Disrupt the Federal Balance By Making the Most Trivial and Local of Thefts Subject to Federal Prosecution.

In *Lopez*, this Court explained that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. As this Court previously noted, in the context of rejecting the proposition that the Hobbs Act was intended to confer upon the federal government the authority to "polic[e] the orderly conduct of strikes," *Enmons*, 410 U.S. at 411, there is no indication in the Act's legislative history that Congress intended to encroach upon criminal prosecutions that had historically been the province of the states: "[n]either the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work . . . such an unprecedented incursion into the criminal jurisdiction of the

States," *id.* Yet the effect of the decision of the court below is to do exactly that: it literally makes a "federal case" out of the most trivial of crimes, the sort of crimes which "would normally be a mainstay of the docket of the local district attorney," *Harrington*, 108 F.3d at 1474 (Sentelle, J., dissenting).

Here, petitioner stole a few hundred dollars from the pizza restaurant at which his co-defendant happened to work. While petitioner's criminal conduct surely should be punished (and presumably would have been prosecuted in state court had the federal government not intervened), it hardly implicates core concerns of the federal government. But once the fact that the victim sometimes buys goods from out of state is sufficient to establish an effect on interstate commerce and thus federal jurisdiction, the federal government's power to prosecute crime is virtually without limit. As Judge Sentelle has pointed out,

> [U]nder [this theory], there is no armed robbery of a commercial victim not covered by the Hobbs Act. There is no corner grocery in Kansas that does not stock orange juice from Florida or California; none in Florida or California that does not stock salt from some other state. Under the government's theory of this case, Congress, in passing the Hobbs Act, intended to federalize the robbery of every Mom and Pop restaurant that buys coffee, spices, or fruit from out of state. That is all of them.

Id. at 1473. Indeed, under the *de minimis* standard, even the robbery of private individuals can be subjected to federal prosecution under the Hobbs Act. *See, e.g.*, *United States v. Taylor*, 176 F.3d 331, 339 (6th Cir. 1999) (rejecting argument that "Hobbs Act is unconstitutional insofar as it is applied to the robbery of a private citizen, or burglary of a private residence").

As Judge Torruella explained in his concurrence in *Jimenez-Torres*, the crime in that case was a fundamentally local crime: "[the defendant] and five other cohorts were 'looking for houses to rob'" and randomly chose one. *Jimenez-Torres*, 435 F.3d at 13 (Torruella, J., concurring). However, the federal government, "in its zeal to make this unfortunate incident into something it is not—criminal activity implicating core federal interests," introduced into evidence at trial various facts about the victim's connection to a commercial establishment, facts that had no bearing on the actual crime. "Upon [an] exiguous thread of irrelevant evidence, the government casts a net that, if allowed to set without challenge, would elbow out large chunks of traditional state criminal jurisdiction and federalize such crimes." *Id.* at 14. "At the rate we are going," Judge Torruella warned, "perhaps the day will come when the federal government will see fit to prosecute the robbery of a child's roadside lemonade stand because the lemons came from California, the sugar was refined in Philadelphia, and the paper cups were manufactured in China." *Id.* at 15.

By bringing "within the scope of the Commerce Clause the proscription of local violent (and other)

crimes not constituting the regulation of commercial activity, crimes prototypical of those that historically have been within the reserved police power of the states," *McFarland*, 311 F.3d at 409-10 (Garwood, J., dissenting from per curiam) (emphasis omitted), the Hobbs Act threatens to "displace . . . policy choice[s] made by the State[s]," *Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring).

This broad federal police power, depriving the states of their traditional authority in the criminal realm, is precisely what *Lopez* and *Morrison* prohibit. By upholding the *de minimis* standard, the courts of appeals have embarked upon a path that threatens to radically change the "constitutional dogma that establishes that, other than by constitutional exception, 'the suppression of violent crime and vindication of its victims' is a power that 'the Founders denied the National Government and reposed in the States.'" *Jimenez-Torres*, 435 F.3d at 14 (Torruella, J., concurring). This radical disruption of the traditional line between federal and state power is in sharp tension with this Court's decisions in *Lopez* and *Morrison*. The courts of appeals' efforts to reconcile the *de minimis* standard with these cases make clear that that standard is incompatible with the analytical framework they establish.

B. Under *Lopez* and *Morrison*, Robbery Is a Non-Economic Activity That Cannot Be Aggregated To Establish the Required Substantial Effect on Interstate Commerce.

The majority below concluded that only a *de*

minimis effect on interstate commerce was necessary to support federal prosecution, holding that "if a statute regulates an activity which, through repetition, in [the] aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." App. 5a (internal quotation marks omitted). Likewise, in the case on which the panel below relied, the Tenth Circuit identified the question as simply whether "the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce." *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995). Both the panel below and the Tenth Circuit, however, failed to consider whether the regulated activity was commercial. The Tenth Circuit thus distinguished *Lopez* solely on the ground that "[u]nlike possession of a firearm in a school zone, . . . robbery and extortion are activities that through repetition can substantially affect interstate commerce." *Id.*

As this Court's recent Commerce Clause cases establish, only activity that is economic or commercial in nature may be aggregated to determine whether there is a substantial effect on interstate commerce sufficient to support regulation under the Commerce Clause. *See, e.g.*, *Lopez*, 514 U.S. at 560 ("[w]here *economic* activity substantially affects interstate commerce, legislation regarding that activity will be sustained" (emphasis added)). Distinguishing the statute at issue in *Lopez* from the statute that was upheld in *Wickard v. Filburn*, 317 U.S. 111 (1942), under an aggregation theory, the Court explained that *Wickard* "involved economic activity in a way

that the possession of a gun in a school zone does not," *Lopez*, 514 U.S. at 560.

In *Morrison*, too, this Court noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613 (emphasis omitted); *see also id.* at 617 (Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). And, most recently, in *Gonzales v. Raich*, 545 U.S. 1 (2005), this Court again emphasized the centrality of the economic nature of the activity to proper Commerce Clause analysis, distinguishing the Controlled Substances Act from the statutes at issue in *Lopez* and *Morrison* on the ground that "the activities regulated by the CSA are quintessentially economic." *Id.* at 25; *see also id.* at 35-36 (Scalia, J., concurring) ("In *Lopez* and *Morrison*, the Court . . . rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.").

These cases also make clear that the "economic" activity that may be regulated under the Commerce Clause is that activity that can be "properly described as 'commercial' or 'economic' *in the same general sense* as 'commercial.'" *See McFarland*, 311 F.3d at 396 (Garwood, J., dissenting from per curiam). In *Lopez*, for example, this Court noted that "Congress has authority under the *Commerce Clause* to regulate numerous *commercial* activities that substantially affect interstate commerce," and recognized

that the "determination whether an intrastate activity is *commercial* or *noncommercial*" was a central question in Commerce Clause analysis. 514 U.S. at 565-66 (emphasis added); *see also id.* at 583 (Kennedy, J., concurring) (congressional regulation inappropriate when it is of an "activity beyond the realm of commerce in the ordinary and usual sense of that term"); *McFarland*, 311 F.3d at 396 (Garwood, J., dissenting from per curiam) (*Lopez* and *Morrison* "appear to use the terms ['commercial' and 'economic'] synonymously"). And in *United States v. Robertson*, 514 U.S. 669 (1995), this Court again recognized that "[t]he 'affecting commerce' test was developed . . . to define the extent of Congress's power over purely *intra*state *commercial* activities that nonetheless have substantial *inter*state effects." *Id.* at 671 (emphasis added); *United States v. Bishop*, 66 F.3d 569, 591 (3d Cir. 1995) (Becker, J., dissenting) ("[i]f the intrastate activity is commercial, the 'substantial effects' jurisprudence applies . . . otherwise, the doctrine is inapplicable and affords Congress no basis for regulation").

Robbery of a few hundred dollars is not "commercial" in the "ordinary and usual sense of that term." *See, e.g.*, *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (Gun Free School Zones Act "regulat[ed] an activity beyond the realm of commerce in the ordinary and usual sense of that term"). The term "commerce" is used to refer to "[b]uying and selling; the exchange of merchandise or services, esp. on a large scale." 1 New Shorter Oxford English Dictionary (1993); *see also* Webster's 3rd New International Dictionary (1993) ("the exchange or buying and sell-

ing of commodities, esp. on a large scale and involving transportation from place to place"). As was noted in *McFarland*, "[r]obbery does have an economic effect. But so, too, do not only all thefts of any kind from any victim but also, for example, virtually all criminal homicides." 311 F.3d at 396-97 (Garwood, J., dissenting from per curiam). But that it has an "economic effect" does not necessarily mean that it also has an effect on interstate commerce; theft, for example, even from a business that buys goods from out of state, may have no effect on interstate commerce if the money stolen is immediately used to purchase other goods that have also moved in interstate commerce (as most have). Concluding that robbery has an effect on interstate commerce (as opposed to an effect on the entity or individual robbed) requires assumptions about how the money would have been used by the true owner, as well as how it will be used by the person who stole it.

And in *Morrison*, this Court rejected reliance on such assumptions and attenuated chains of causation in establishing an effect on interstate commerce, recognizing that petitioners' "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce. . . . would allow Congress to regulate *any* crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." 529 U.S. at 615; *see also Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the

commerce power may reach so far"). Thus, this Court expressly "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617; *see also McFarland*, 311 F.3d at 397 (Garwood, J., dissenting from per curiam) ("*Morrison* rejects the notion that Congress may regulate a crime simply because 'the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.'").

Nothing in *Gonzales* alters the conclusion that robbery is not within the class of activity that may be aggregated for purposes of Commerce Clause analysis. Although *Gonzales* did recognize that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale," such regulation is permissible only when the "failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." 545 U.S. 1, 18 (2005). As Justice Scalia explained in his concurrence, while Congress' power "'to make . . . regulation effective' commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct." *Id.* at 37 (Scalia, J., concurring). Thus, in *Gonzales*, regulation of the purely local growth and consumption of marijuana was proper because "[t]he regulation of an intrastate activity [was] essential to a comprehensive regulation of interstate commerce." *Id.* at 31; *cf. Lopez*, 514 U.S. at 574 (Kennedy, J.,

concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").[3] Here, however, there is no comprehensive regulatory scheme comparable to the CSA. *See, e.g.*, *Harrington*, 108 F.3d at 1476 (Sentelle, J., dissenting) ("Congress did not undertake a general regulatory scheme of armed robberies.").

Accordingly, this Court's review is necessary to

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[3] Indeed, the majority in *Gonzales* repeatedly noted that failure to regulate the intrastate growth of marijuana would meaningfully undercut the regulation of the interstate market. *See, e.g.*, *id.* at 18 ("Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."); *id.* at 19 ("Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions"); *id.* ("parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market"); *id.* ("regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity"); *id.* at 22 ("we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA"); *id.* at 26 ("CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.").

clarify the class of activity that can properly be aggregated to establish the required "substantial effect" on interstate commerce, and to establish that "robbery" is not "commercial" in the sense that makes aggregation appropriate for the purposes of Commerce Clause analysis.

C. Under *Lopez* and *Morrison*, the Existence of a Jurisdictional Element Does Not Lessen the Showing Required To Establish a Substantial Effect on Interstate Commerce.

Although the panel below relied upon an aggregation theory, several other courts of appeals appear to have concluded that local robberies can be federally prosecuted primarily (if not solely) because the Hobbs Act contains a jurisdictional element. *See, e.g.*, *United States v. Capozzi*, 347 F.3d 327, 336 (1st Cir. 2003) ("Congress' inclusion of a jurisdictional element in the Hobbs Act addresses the *Lopez* Court's constitutional concern that congressional authority under the Commerce Clause not become a 'general police power of the sort retained by the States'" (emphasis omitted)); *United States v. Fabian*, 312 F.3d 550, 555 (2d Cir. 2002) ("As the Hobbs Act requires a particularized jurisdictional showing, we find Morrison does not affect our requirement that 'the Government need only show a "minimal" effect on interstate commerce' to support Hobbs Act jurisdiction."); *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006) ("a statute with an express jurisdictional nexus to interstate commerce may be applied in circumstances where the actual connection to interstate commerce is small"); *United States v.*

Atcheson, 94 F.3d 1237, 1242 (9th Cir. 2006) ("Because the Hobbs Act is concerned solely with *interstate*, rather than *intrastate*, activities, we conclude that *Lopez*'s 'substantially affects' test is not applicable."); *Harrington*, 108 F.3d at 1465 (*Lopez*, in recognizing the "central role that a jurisdictional element can play in the valid application of a federal criminal statute, clearly does not assume that a 'substantial' effect on interstate commerce need be shown in such a setting").

But the jurisdictional element, while establishing that the statute was enacted pursuant to Congress' Commerce Clause power and thus regulates only those instances that have an effect on interstate commerce, says nothing about *how large an effect* is required to satisfy constitutional requirements. *See Bishop*, 66 F.3d at 594 (Becker, J., dissenting) ("a jurisdictional element functions only to limit the regulation to interstate activity *or* to ensure that the intrastate activity which is regulated satisfies one of the three tests of congressional power"). As the Court explained in *Lopez*, the purpose of a jurisdictional element is to "ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." 514 U.S. at 561. *Lopez* nowhere suggested that the mere existence of the jurisdictional element is itself reason to hold that all convictions under the statute are constitutional even in the absence of that case-by-case inquiry.

Nonetheless, as the dissenters in *McFarland* observed, "some of our sister circuits have relied on [the existence of a jurisdictional element] (among other considerations) in holding that *Lopez* and *Mor-*

rison are either largely inapplicable to Hobbs Act cases, or do not require that a substantial effect on interstate commerce be shown in Hobbs Act prosecutions falling under *Lopez* category three." 311 F.3d at 394 (Garwood, J., dissenting from per curiam).[4] But, contrary to these lower court decisions, this Court left no doubt in *Lopez* that an intrastate activity must "substantially affect" interstate commerce to be subject to regulation pursuant to the Commerce Clause. As this Court explained, "our case law ha[d] not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." 514 U.S. at 559. It then resolved the confusion: "We conclude, consistent with the great weight of our case law, that the

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[4] *See* Andrew Weis, Note, *Commerce-Clause in the Cross-Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 Stan. L. Rev. 1431, 1454 (1995) ("[t]he lower courts appear to assume that the mere presence of a jurisdictional element . . . . automatically renders a statute constitutional"); Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal. L. Rev. 1675, 1680 (2002) ("Because courts do not subject statutes containing a jurisdictional element to the stricter 'substantial effects' standard of review, Congress's Commerce Clause power remains essentially unchanged after *Lopez* and *Morrison*."); George D. Brown, *Counterrevolution?—National Criminal Law After* Raich, 66 Ohio St. L.J. 947, 989 (2005) ("it was easy for the lower courts to conclude either that the mere presence of a jurisdictional element saved a statute from possible invalidity, or to construe statutes using this technique in a way that made satisfying the requirements of the elements a simple task for prosecutors").

proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559; *see also id.* ("we have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity *substantially affected* interstate commerce"); *id.* at 560 ("[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"). The simple existence of a jurisdictional element does not change that constitutional requirement.

Thus, following this Court's clear holding in *Lopez*, there is no basis for concluding that Congress has "the power to provide for a *lesser* relation to interstate commerce . . . simply by including a jurisdictional provision." *McFarland*, 311 F.3d at 394-95 (Garwood, J., dissenting from per curiam); *see also Morrison*, 529 U.S. at 616 ("[u]nder our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace"). Otherwise, Congress could bring under federal control any intrastate activity that has a *de minimis* effect on interstate commerce simply by including a jurisdictional element in the statute. *See Lopez*, 514 U.S. at 557 (internal quotation marks omitted); Weis, *supra*, at 1456 ("[u]nder the 'logic' of [lower courts'] reading, the *Lopez* Court could have upheld § 922(q) if Congress had simply inserted a jurisdictional element into its text"); *cf. Bishop*, 66 F.3d at 593 (Becker, J., dissenting) ("[the majority's] reasoning supports the government's contention that *Lopez* would have been decided differently had § 922(*q*) . . . simply contained a requirement that the gun had at

some point been transported in interstate commerce"); *id.* at 596 ("majority's holding effectively renders the Supreme Court's three-part Commerce Clause analysis superfluous, and permits Congress, through the inclusion of a meaningless interstate commerce provision, to 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States'" (emphasis omitted)).

Accordingly, this Court's review is warranted to clarify that Congress may not expand its own power under the Commerce Clause simply by including a jurisdictional element in statutes enacted under the Commerce Clause.

III. THIS CASE PRESENTS A GOOD VEHICLE FOR ADDRESSING THIS RECURRING AND IMPORTANT ISSUE

Aside from the confusion in the courts of appeals and the tension between the decision below and this Court's Commerce Clause jurisprudence, review is also warranted because the factual scenario raising the question at issue is recurring. As the cases discussed above indicate, the federal government repeatedly prosecutes individuals whose criminal activity has, at best, a *de minimis* effect on interstate commerce. And the confusion about the proper application of *Lopez* that is evident in the Hobbs Act context is likely to infect other federal criminal statutes as well. *See, e.g.*, *Bishop*, 66 F.3d at 591 (Becker, J., dissenting) ("the majority views *Lopez* as either a narrow decision or something of a 'sport.' . . . I view *Lopez* as a beacon that we must follow, and the direction in which the beacon points compels my

vote to invalidate the carjacking statute as beyond the broad reach of Congress's Commerce Clause power"). Moreover, because the courts of appeals have all weighed in on this question, and there is internal division in at least four circuits, there are lengthy opinions that articulate all the various competing arguments. There is thus no need to wait for additional appellate consideration of the question. *See infra* at 7 & n.2.

Moreover, this case is an ideal vehicle to clarify the proper application of *Lopez* and *Morrison* in the federal criminal context. This case squarely presents the question because the evidence that petitioner's robbery of a few hundred dollars had an effect on interstate commerce is *de minimis* (at best). Indeed, the pizza restaurant which petitioner robbed does not even buy goods from out of state; to the contrary, the restaurant's owner testified that the only place from which he orders supplies is a food service distributor in Columbus, Ohio. Pet. C.A. Br. at 4. The claimed connection to interstate commerce is the Columbus distributor's purchase of its supplies from out of state. *Id.* Only under the *de minimis* standard could such a claimed connection possibly pass constitutional muster. And, this question, *i.e.*, whether the *de minimis* standard survives *Lopez* and *Morrison*, was also squarely presented below, *id.* at 7-11, so there is no concern about waiver. And, finally, there are no other legal issues that could complicate the analysis. This case presents an excellent vehicle for the Court to use to heed Judge Suhrheinrich's call that it "consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*"

and thereby restore clarity to the proper meaning of the Commerce Clause in the federal criminal context.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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May 22, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RAJAH BAYLOR,
Defendant-Appellant.
No. 07-3002

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 06-00168 - James S. Gwin, District Judge.

Submitted: February 7, 2008

Decided and Filed: February 26, 2008

Before: SUHRHEINRICH, SUTTON, and GRIFFIN, Circuit Judges.

COUNSEL

ON BRIEF: James M. Campbell, Akron, Ohio, for Appellant. Duncan T. Brown, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

GRIFFIN, J., delivered the opinion of the court, in which SUTTON, J., joined. SUHRHEINRICH, J. (p. 5), delivered a separate concurring opinion.

OPINION

GRIFFIN, Circuit Judge. Following a jury trial in the United States District Court for the Northern District of Ohio, Rajah Baylor was convicted on one count of interfering with commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and one count of using a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Baylor was subsequently sentenced to a term of 140 months of imprisonment. He now appeals his convictions, arguing that the requirement of a *de minimis* effect on interstate commerce under the Hobbs Act is unconstitutional in light of the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000). Baylor argues further that, even assuming that the *de minimis* standard is appropriate, the government failed to show that his activity had such an effect on interstate commerce. Finding each of Baylor's arguments to be devoid of merit, we affirm his convictions.

I.

On the evening of December 21, 2005, Little Caesar's manager Tina Martin was in the process of closing a Cleveland-area location of the chain pizza restaurant when a brick, thrown from the outside, shattered the glass of the front door. A man dressed in all black, with a hooded sweatshirt covering the top of his head and a mask covering his face, stepped forward and pointed a .38 revolver at Martin, demanding that she open the store's register. The man struck Martin on the head and left with $538.

Cleveland police officers later pulled over a vehicle driven by Baylor's accomplice, Kevin Oliver, and arrested Baylor and Oliver, finding a gun, masks, and gloves on the floorboard of the vehicle. The police returned the suspects to the Little Caesar's restaurant, where Martin identified Baylor as her assailant. Following a two-day trial, a jury convicted Baylor of interfering with commerce by robbery (Count One), in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and of using a firearm in relation to a crime of violence (Count Two), in violation of 18 U.S.C. § 924(c)(1)(A)(ii). The district court then sentenced Baylor to a term of 56 months of imprisonment on Count One and 84 months on Count Two, to be served consecutively, for a total term of 140 months of imprisonment.

II.

Baylor argues that in order to satisfy the jurisdictional element of the Hobbs Act, his activity must have had more than a *de minimis* effect on interstate commerce. Accordingly, Baylor contends that our prior cases interpreting the Hobbs Act, which have held that a *de mimimis* effect on interstate commerce is sufficient to meet constitutional requirements, should be re-examined in light of the Supreme Court's decision in *Morrison*. In *Morrison*, the Court invalidated the civil remedy provision of the Violence Against Women Act, holding that it did not regulate activity that substantially affected interstate commerce. 529 U.S. at 613. Five years earlier, in *United States v. Lopez*, 514 U. S. 549 (1995), the Court held that Congress's enactment of the Gun-Free School Zones Act of 1990 exceeded the scope of its authority under the

Commerce Clause, in that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," *Lopez*, 514 U.S. at 567. *See also United States v. Dupree*, 323 F.3d 480, 485 n.1 (6th Cir. 2003) (summarizing the holdings of *Lopez* and *Morrison*).

We review Baylor's argument de novo because it raises a question of law. *United States v. Smith*, 182 F.3d 452, 455 (6th Cir. 1999).

The Hobbs Act provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion...shall be fined ... or imprisoned ...." 18 U.S.C. § 1951(a). In *Smith*, we reaffirmed our pre-*Lopez* holdings that the government must prove only that a robbery had a *de minimis* effect on interstate commerce in order to satisfy the jurisdictional requirement of the Hobbs Act. Surveying the weight of authority from our sister circuits, we observed that:

> All of the other circuits that have considered the issue have held that the *de minimis* standard for Hobbs Act charges survived *Lopez*, although the Fifth Circuit has recently granted a rehearing on this issue. *See United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997); *United States v. Alfonso*, 143 F.3d 772, 775 (2d Cir. 1998); *United States v. Farrish*, 122 F.3d 146, 147 (2d Cir. 1997); *United States v. Hickman*, 151 F.3d 446, 456 (5th Cir. 1998), *reh'g granted and op. vacated*, 165 F.3d 1020 (5th Cir. 1999), [*affirmed by* 179

F.3d 230 (5th Cir. 1999) (en banc)]; *United States v. Miles*, 122 F.3d 235 (5th Cir. 1997); *United States v. Robinson*, 119 F.3d 1205 (5th Cir. 1997), *cert. denied*, 522 U.S. 1139 (1998); *United States v. Nelson*, 137 F.3d 1094, 1102 (9th Cir. 1998); *United States v. Woodruff*, 122 F.3d 1185 (9th Cir. 1997); *United States v. Beydler*, 120 F.3d 985, 987 (9th Cir. 1997); *United States v. Nguyen*, 155 F.3d 1219, 1224 (10th Cir. 1998); *United States v. Bruce*, 78 F.3d 1506, 1509 (10th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 398-99 (10th Cir. 1995); *United States v. Paredes*, 139 F.3d 840 (11th Cir. 1998) (Wellingford, J., sitting by designation); *United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir. 1997).

Smith, 182 F.3d at 456. We found persuasive the Tenth Circuit's reasoning in *Bolton* that in *Lopez*, the Supreme Court "recognized that if a statute regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence," *id.* (quoting *Bolton*, 68 F.3d at 399) (internal citation and quotation omitted), and held that the "*de minimis* standard for the interstate commerce effects of individual Hobbs Act violations survived *Lopez*." *Smith*, 182 F.3d at 456.

Four years later, in *Dupree*, we addressed the same argument that Baylor now raises - that *Morrison* requires the government to prove more than a *de minimis* effect on interstate commerce under the Hobbs Act. *Dupree*, 323 F.3d at 484-85. We rejected that claim, reaffirming our prior holding

in *Smith* that "the traditional *de minimus* standard for Hobbs Act violations" was appropriate following *Lopez* and *Morrison*, so that "'if a statute regulates an activity which, through repetition, in [the] aggregate has a substantial effect on interstate commerce, the *de minimus* character of individual instances arising under the statute is of no consequence.'" *Dupree*, 323 F.3d at 485 (quoting *Smith*, 182 F.3d at 456).

Most recently, we considered the *de minimis* standard's applicability to the Hobbs Act in *United States v. Davis*, 473 F.3d 680, 681 (6th Cir. 2007). Specifically, in *Davis*, we rejected the defendant's argument that the *de minimis* standard is no longer applicable to the Hobbs Act after the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005). *Davis*, 473 F.3d at 682. As we explained:

> There is no reading of *Raich* that supports Davis's contention that this Court cannot continue to apply the *de minimis* standard to Hobbs Act cases, where, as here, the extortion is directed at a business. The Hobbs Act, like the [Controlled Substances Act at issue in *Raich*], regulates activities, which, in the aggregate, have a substantial effect on interstate commerce. *See United States v. Bolton*, 68 F.3d 369, 399 (10th Cir. 1995) ("In enacting the Hobbs Act, Congress determined that robbery and extortion are activities which through repetition may have substantial detrimental effects on interstate commerce.") (citing H.R. Rep. No. 238, 79th Cong., 1st Sess., (1945), *reprinted in* 1946 U.S.C.C.A.N. 1360, 1370); *see also* [*United States v.*] *Wang*,

> 222 F.3d [234] at 238 [(6th Cir. 2000)] ("*Lopez* did not require realignment of the Hobbs Act's jurisdictional nexus because individual instances arising under the statute could, through repetition, have a substantial effect on interstate commerce.") (citing *Smith*, 182 F.3d at 456). Therefore, *Raich* permits, rather than restricts, the continued application of the *de minimis* standard where the Hobbs Act offense is directed at a business.

Davis, 473 F.3d at 683. We are bound by our prior published opinions in *Smith*, *Dupree*, and *Davis*, and must reject Baylor's challenge to the *de minimis* standard. *See* Sixth Cir. R. 206(c); *United States v. Humphrey*, 287 F.3d 422, 452 (6th Cir. 2002).

Finally, we note that since *Smith*, which was published prior to *Morrison*, our sister circuits have continued to apply the *de minimis* standard to the interstate commerce nexus under the Hobbs Act in the wake of *Morrison*. *See United States v. Griffin*, 493 F.3d 856, 861 (7th Cir. 2007); *United States v. Nascimento*, 491 F.3d 25, 37 n.3 (1st Cir. 2007); *United States v. Boyd*, 480 F.3d 1178, 1179 (9th Cir. 2007); *United States v. Davila*, 461 F.3d 298, 306-07 (2d Cir. 2006); *United States v. Foster*, 443 F.3d 978, 983 n.3 (8th Cir. 2006); *United States v. Urban*, 404 F.3d 754, 766 (3d Cir. 2005); *United States v. McCormack*, 371 F.3d 22, 28 (1st Cir. 2004), vacated on other grounds, 543 U.S. 1098 (2005); *United States v. Malone*, 222 F.3d 1286, 1294-95 (10th Cir. 2000). It appears that the Fifth Circuit is divided as to whether the aggregation principle may be applied to allow Hobbs Act convictions where the impact on interstate commerce of individual robberies is

minimal. See *United States v. McFarland*, 311 F.3d 376, 409-10 (5th Cir. 2002) (en banc) (dividing equally on aggregation principle, and therefore affirming defendant's conviction).

III.

Although he does not identify this claim in his brief's "Issues Presented For Review," Baylor also argues that the government did not offer sufficient evidence at trial to satisfy the *de minimis* standard, Federal Rule of Appellate Procedure 28(a) requires the appellant's brief to contain, *inter alia*, "a statement of the issues presented far review...." *See also, e.g., United States v. Winkle*, 477 F.3d 407, 416 n.4 (6th Cir. 2007); *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 462 (6th Cir. 2003). Baylor's brief on appeal identified only a single issue for review. "Whether the *de minimis* threshold is constitutionally sufficient to fulfill the jurisdictional element of the Hobbs Act?"

Assuming, without deciding, that Baylor has raised this issue properly for our review, his argument is plainly without merit. At trial, the government offered the testimony of Joe Mestrovich, the senior director of logistics and transportation services for Blue Line Food Service Distribution ("Blue Line"). Mestrovich testified that Blue Line distributes food products for Little Caesar's restaurants, including the Cleveland location that was robbed by Baylor. He testified further that the food products (cheeses, flours, sauces) traveled through interstate commerce to the Blue Line warehouse in Columbus, Ohio, before they were shipped to the Little Caesar's restaurant that Baylor

robbed. For example, Mestrovich stated that the flour used by the Cleveland Little Caesar's restaurant originated in Minnesota, the sauce from California, and the cheese from Wisconsin. This testimony alone is sufficient to satisfy the *de minimis* standard. *See United States v. Watkins*, 509 F.3d 277, 281 (6th Cir. 2007) (holding that *de minimis* standard is satisfied where defendant robbed check-cashing business that drew checks on nationwide banks); *Davis*, 473 F.3d at 684 (finding *de minimis* standard satisfied by extortion of a bar that purchased alcohol that had traveled in interstate commerce); *United States v. Brown*, 959 F.2d 63, 68 (6th Cir. 1992) (holding that *de minimis* standard was satisfied where defendant attempted to rob a bar that purchased alcohol that had traveled in interstate commerce).

IV.

For the reasons stated, we affirm Baylor's convictions.

CONCURRENCE

SUHRHEINRICH, Circuit Judge, concurring. I concur because the majority's decision is consistent with the law of this Circuit and most other circuits, and is thus correct. However, I think those decisions are inconsistent with the recent Supreme Court precedent, and more fundamentally, the doctrine of federalism.

In *United States v. Lopez*, the Supreme Court held that to fall within the scope of the Commerce Clause, the regulated activity must substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1985) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). In *United States v. Morrison*, the Supreme Court expressly rejected an aggregation theory when regulating non economic activity.

> The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

United States v. Morrison, 529 U.S. 598, 617 (2000) (citations omitted). By continuing to allow a *de minimis* standard for individual violations of the Hobbs Act, we are essentially nullifying the

"substantial effect" test of *Lopez* and *Morrison*. *See United States v. Dupree*, 323 F.3d 480, 485 (6th Cir. 2000) (holding that "the traditional *de minimis* standard for Hobbs Act violations survived *Lopez*").[1]

The effect of our Court s rulings is that every local robbery of a business in the United States is a federal crime. I acknowledge that the Supreme Court has held that Congress intended to include within the scope of the Hobbs Act conduct that was already punishable under the state robbery and extortion statutes. *See United States v. Culbert*, 435 U.S. 371, 379-80 (1978). However, I cannot believe that this is what the Founding Fathers intended. Moreover, I have harbored the hope that the Supreme Court in *Lopez* was seeking to restore a proper state-federal balance that gives actual meaning to the term federalism. I also hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*.

---

[1] Notably, *United States v. Dupree* never directly addressed the holding from *Morrison*, but rather found it sufficient to rely on *United States v. Smith*, 182 F.3d 452 (6th Cir. 1999), which was decided after *Lopez* but before *Morrison*.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	
RAJAH BAYLOR	Case Number: 1:06CR00168-002
	USM Number: 30614-160
	James Campbell Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): __.
[ ] pleaded nolo contendere to counts(s) __ which was accepted by the court.
[x] was found guilty on count(s) 1 and 2 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense
18 USC Sec. 1951(a)	Interference with Commerce by Robbery
18 USC Sec. 924(c)(1)(A)(ii)	Use of Firearm in Relation to Crime of Violence

Offense Ended	Count
12/21/05	1
12/21/05	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) __.
[ ] Count(s) __ (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States Attorney of material changes in the defendant's economic circumstances.

12/20/06
Date of Imposition of Judgment

s/ James S. Gwin
Signature of Judicial Officer

JAMES S. GWIN, United States District Judge
Name & Title of Judicial Officer

12/20/06
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 56 months on Count 1 and 84 months on Count 2 to be served consecutively with credit for time served.

The defendant shall participate in the Bureau of Prison's Inmate Financial Responsibility Program.

[x] The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in the following facility: FCI McKean.

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at __ on __.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before 2:00 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10)the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11)the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12)the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13)as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISED RELEASE

None.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$200	$	$450

[ ] The determination of restitution is deferred until. An amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

[x] The defendant must make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	*Total Loss
Louis Achkar	$450.00
TOTALS:	$450.00

Restitution Ordered	Priority or Percentage
$450.00	100
$450.00	100

[ ] Restitution amount ordered pursuant to plea agreement $_____.

[ ] The defendant must pay interest on restitution and a fine of more than $2500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine [ ] restitution.

[ ] The interest requirement for the [] fine [] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due
[ ] not later than or
[ ] in accordance with [ ] C, [ ] D, [ ] E, or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C [ ] D, or [ ] F below); or

C [ ] Payment in equal installments of $ over a period of, to commence days after the date of this judgment; or

D [ ] Payment in equal installments of $ over a period of, to commence days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The Court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [x] Special instructions regarding the payment of criminal monetary penalties:

[x] A special assessment of $200 and restitution in the amount of $450 are due in full immediately as to count(s) 1 and 2 of the Indictment. While incarcerated defendant shall pay 25% of his gross monthly income through the Federal Bureau of Prisons Inmate Financial Responsibility Program towards restitution. Any balance remaining upon release from incarceration shall be paid at the rate of not less than 10% of defendant's gross monthly income until paid in full and payments shall begin no later than 60 days following release from incarceration. PAYMENT IS TO BE MADE PAYABLE AND SENT TO THE CLERK, U.S. DISTRICT COURT

[ ] After the defendant is release from imprisonment, and within 30 days of the commencement of the term of supervised release, the probation officer shall recommend a revised payment schedule to the Court to

satisfy any unpaid balance of the restitution. The Court will enter an order establishing a schedule of payments.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several (Defendant name, Case Number, Total Amount, Joint and Several Amount and corresponding payee):

[ ] The defendant shall pay the cost of prosecution.
[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest; (4) fine principal; (5) fine interest; (6) community restitution; (7) penalties; and (8) costs, including cost of prosecution and court costs.

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(2)

No. 07-1461

Supreme Court, U.S.
FILED
JUN 11 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

RAJAH BAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE, THE CATO INSTITUTE, AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether use of the Hobbs Act to prosecute local robberies that have only a *de minimis* effect on interstate commerce is consistent with the Commerce Clause, congressional intent, and constitutional clear-statement rules.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The Sixth Circuit in this case held that the Commerce Clause permits the United States to prosecute any robbery under the Hobbs Act that has some *de minimis* effect on interstate commerce. Federal jurisdiction over petitioner's crime was established by the fact that the pizzeria he robbed bought its flour from Minnesota, its sauce from California, and its cheese from Wisconsin.

If allowed to stand, this decision threatens to eliminate any meaningful limitation on the scope of the commerce power. As this Court recognized in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), Congress has the power to regulate only activities that have a "substantial effect" on interstate commerce; it does not have the power to criminalize robbery of a pizzeria based only on a case-by-case showing that out-of-state objects were present at the crime scene. Reliance on these sorts of *de minimis* connections to interstate commerce is particularly inappropriate given that the Congress that enacted the Hobbs Act in 1946 never purported to expand so broadly the scope of the commerce power.

These *amici curiae*[1] believe that federal powers must be properly cabined to respect federalism and

---

[1] Counsel of record for all parties received notice at least 10 days before the due date of the *amici*'s intention to file this brief and have consented. The parties' letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

foster political accountability—as our Constitution provides, and the Founders intended. *The Center for Constitutional Jurisprudence* was founded in 1999 as the public interest litigation arm of the Claremont Institute to advance the Institute's mission to restore the principles of the American Founding to their rightful and preeminent authority in our national life. *The Cato Institute* is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. *The Goldwater Institute* is a nonpartisan educational organization, which engages in research dedicated to developing a comprehensive vision for a balanced, constitutional rule of law through its Dorothy D. and Joseph A. Moller Center for Constitutional Government.

In addition to various research and publishing activities, all three *amici* conduct litigation, including the filing of *amicus* briefs in cases involving issues that go to the heart of our constitutional structure. This case is of central interest to *amici* because it asks whether the decision below drew a proper line between the States' power to punish local violent crime and the federal government's power to regulate interstate commerce. The *amici* believe that it did not.

STATEMENT OF THE CASE

Petitioner robbed a Cleveland-area Little Caesar's pizzeria of $538. He was charged with violating the Hobbs Act, 18 U.S.C. § 1951, which makes it a federal crime to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce by robbery or extortion." Pe-

titioner was convicted by a federal jury and sentenced to 56 months in prison.

The Sixth Circuit held that the Commerce Clause authorized this prosecution because petitioner's robbery had a *de minimis* effect on interstate commerce. Specifically, federal jurisdiction was established by the fact that the ingredients that the pizzeria used to make pizza came from outside Ohio—its flour, sauce, and cheese, for example, all traveled in interstate commerce. Based on the presence of these well-traveled ingredients, petitioner's robbery of a pizza shop became a federal offense.

REASONS FOR GRANTING THE PETITION

This Court's guidance is needed to draw a sensible and constitutional line between the States' power to punish violent crime, *United States* v. *Morrison*, 529 U.S. 598 (2000); *United States* v. *Lopez*, 514 U.S. 549 (1995), and Congress's power to regulate interstate markets under the Commerce Clause, *Gonzales* v. *Raich*, 545 U.S. 1 (2005). Contrary to the decision below, the Commerce Clause does not give Congress the power to punish a robber merely because ingredients that traveled in interstate commerce witnessed his crime. Our constitutional system divides the people's sovereign power between the national and state governments. The decision below would obliterate this division of power because it admits of no limit on the power of Congress to "regulate commerce."

In addition, using the *de minimis* standard to delimit the scope of federal authority under the Hobbs Act ignores the fact that *every* State has traditionally criminalized robbery. Federal law may not be applied so as to systematically ignore the state interest in

criminal law enforcement—particularly where jurisdiction is determined on a case-by-case basis, as it is under the Hobbs Act. Even where Congress determines that a comprehensive federal regime is necessary to protect interstate commerce, federalism must be respected. See *Raich*, 545 U.S. at 39 (Scalia, J., concurring) ("a law is not *proper* for carrying into execution the Commerce Clause when it violates a constitutional principle of state sovereignty") (internal quotation and alteration marks omitted); *Morrison*, 529 U.S. at 614 (ultimately, the issue of constitutionality is always for this Court).

Moreover, in this case, Congress made no such determination. To the contrary, Congress enacted the Hobbs Act to close a narrow gap in the Anti-Racketeering Act, and understood itself to be providing direct protection for goods and persons actually in the flow of interstate commerce. Congress did not mean for the federal government to police every robbery with a *de minimis* effect on commerce. Under the circumstances, therefore, deference to Congress weighs strongly *against* the extension of federal power approved by the decision below. That is especially so in light of this Court's precedents holding that federal criminal statutes should be interpreted narrowly to avoid constitutional infirmities under the Commerce Clause. *E.g., Jones* v. *United States*, 529 U.S. 848, 859 (2000) (construing the federal arson statute narrowly to avoid "mak[ing] virtually every arson in the country a federal offense").

In fact, this Court has already held that the Hobbs Act does not contain the kind of unambiguous language required for such a significant encroachment on state authority. See *United States* v. *Enmons*, 410

U.S. 396, 411 (1973) (Hobbs Act does not apply to violence committed during a lawful strike). Unfortunately, the lower courts and federal law enforcement officials have been less conscientious about respecting the constitutional limits on federal power. It was only in the 1970s—decades after enactment—that the Hobbs Act was first used to prosecute local robberies. But today, unconstitutional misapplication of the Act is widespread. This Court's guidance is needed to ensure that the Hobbs Act does not become a vehicle for the federalization of garden-variety local crimes, to the detriment of the principles of federalism that undergird our Constitution.

I. The Decision Below Failed To Consider Whether Local Robbery Is *Violent Crime* Properly Controlled By The States, Or *Economic Activity* Within The Federal Commerce Power.

The sweeping aggregation rule applied by the court below allows a federal statute to reach localized instances of violent crime, in contravention of *Lopez*, *Morrison*, and the principle that Congress's Commerce Clause powers are limited. This Court's guidance is needed to clarify that regulation of violent criminal activity with only a *de minimis* effect on interstate commerce lies solely within the province of the States.

A. The Decision Below Fails To Distinguish Between Violent Crime And Economic Activity.

The decision below threatens to eliminate any meaningful limit on the commerce power by treating local robberies not as violent crime but as interstate commerce. Article I of the Constitution lists the powers "herein granted" to Congress, including the com-

merce power here at issue: "Congress shall have power * * * [t]o regulate commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3. The Tenth Amendment, by expressly reserving to the States and the people all powers the Constitution had not delegated to the federal government, further confirms that Congress's powers are exclusive and limited, rather than illustrative and broad. The interpretation of every enumerated power in the Constitution must be consistent with this larger design. An interpretation that amounts to a plenary grant of power where a limited grant was intended cannot be correct. Yet that is precisely the power ascribed to Congress by the court below.

Since its first major Commerce Clause decision, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court's interpretation of the commerce power has understandably expanded, consistent with revolutionary changes in how our economy operates and the problems that such changes have created in distinguishing inter- from intra-state commerce. As one distinguished commentator put it: "Constitutional limits expressed in terms of interstate consequences lead to different results when applied to railroads than when applied to a horse and buggy." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1488 (1987).

At the same time, it has always been recognized that there are limits on the scope of federal power. In *Lopez*, for example, the Court held that the commerce power was not so broad as to allow Congress to regulate possession of guns in school zones. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition

elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567. The Court emphasized that the gun-ban at issue was a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561.

The Court grounded its decision in principles of federalism and the Framers' conception that a federal government of delegated, enumerated, and thus limited powers was a vital check on abuse of governmental authority: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 552 (citation omitted). Treating the robbery of a pizza shop as interstate commerce based on where sauce and mozzarella are made makes no more sense than treating gun possession as interstate commerce based on where iron ore is mined. The primary focus of any meaningful commerce clause analysis must be on the nature of the activity being regulated.

Morrison reaffirmed these limits, holding that the effect of violence against women on interstate commerce was not substantial enough to justify federal regulation. The Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617. The

Court stressed that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618. Thus, after *Morrison*, the fact that an activity may, in the aggregate, have a substantial effect on interstate commerce is not sufficient to justify congressional regulation, especially if such regulation interferes with a power generally reserved to the States, such as the police power.

The court of appeals declined to follow *Lopez* and *Morrison* on the basis that the crime at issue here—robbing a pizzeria of $528 dollars—is economic or commercial activity. But while the Hobbs Act applies to racketeering activity (which may conceivably be considered "economic," see Part II, below), that is not the application of the Act challenged here. As the Court observed in *Raich*, "economics" refers to "the production, distribution, and consumption of commodities." 545 U.S. at 25-26 (quoting *Webster's Third New International Dictionary* 720 (1966)). A local robbery may not fairly be characterized as the production, distribution, or consumption of commodities. Robberies are violent crime—far more akin to the violence against women at issue in *Morrison* than to the interstate commercial narcotics market at issue in *Raich*.

Nor is the *aggregate* effect that local robberies might have on economic activity sufficient to justify regulating them under federal law. In *Raich*, the Court reaffirmed Congress's power to regulate matters of local concern, but only as part of comprehensive regulation of an interstate market. 545 U.S. at 18. The statute at issue there regulated the manu-

facture and distribution of narcotics; the question was whether that law could be applied to prohibit the growth of marijuana for purely in-state, medicinal use. As the Court explained, federal drug laws are part of a broad regulatory scheme that is within the bounds of Congress's authority. *Id.* at 18-19. Without the ability to regulate the local growth of marijuana, Congress's ability to accomplish its constitutionally-legitimate goals for the interstate drug market would be compromised.

The Hobbs Act regulates no such market; indeed, the government has not even attempted to show an interstate market in the robbery of pizzerias. Cf. *Wickard* v. *Filburn*, 317 U.S. 111, 125-128 (1942) (focusing on the aggregate commercial effects of on-farm wheat production). Of course, "Congress may protect, enhance, or restrict some particular interstate economic market, such as those in wheat, credit, minority travel, abortion service, illegal drugs, and the like, and Congress may regulate intrastate activity as part of a broader scheme." *United States* v. *McFarland*, 311 F.3d 376, 400 (5th Cir. 2002) (Garwood, J., dissenting from *per curiam* order for equally divided *en banc* court). But the Hobbs Act, as applied in these circumstances, "is not a regulation of any relevant economic market, nor are there other rational connections among nationwide robberies that would entitle Congress to make federal crimes of them all." *Ibid.*

The decision below fails even to attempt to distinguish between the violent crime swept into the federal domain by its application of the Hobbs Act, and the violent crime placed off-limits by *Lopez* and *Morrison*. The Sixth Circuit's rationale (if not necessarily the result) thus goes far towards destroying the tradi-

tional line between state and federal jurisdiction and overthrowing the truism that "[t]he Constitution creates a Federal Government of *enumerated* powers." *Lopez*, 514 U.S. at 552 (emphasis added). If this view is to become the law, such a decision should come from this Court, not the courts of appeals.

B. The Decision Below Ignores Local Interests In Policing Violent Crime.

The Sixth Circuit's failure to recognize that States uniformly regulate conduct like petitioner's as garden-variety violent crime further confirms the need for this Court's review. The criminal code of every State provides for the prosecution of robberies of the sort committed by petitioner.[2] And even before the

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[2] Ala. Code § 13a-8-41; Alaska Stat. § 11.41.500; Ariz. Rev. Stat. § 13-1902; Ark. Code § 5-12-102; Cal. Penal Code § 1016; Colo. Rev. Stat. § 18-4-301; Conn. Gen. Stat. § 53a-133; Del. Code Tit. 11, § 831; D.C. Code § 22-2901; Fla. Stat. § 812.13; Ga. Code § 16-8-40; Haw. Rev. Stat. § 708-840; Idaho Code § 18-6501; 720 Ill. Comp. Stat. 5/18-1; Ind. Code § 35-42-5-1; Iowa Code § 711.1; Kan. Stat. § 21-3426; Ky. Rev. Stat. § 515.00; La. Rev. Stat. § 14:64.1; Me. Rev. Stat. Tit. 17-A, § 651; Md. Code, Crim. Law § 3-402; Mass. Gen. Laws Ch. 265, §17; Mich. Comp. Laws § 750.530; Minn. Stat. § 609.24; Miss. Code § 97-3-77; Mo. Stat. § 569.020; Mont. Code § 45-5-401; Neb. Rev. Stat. § 28-324; Nev. Rev. Stat. § 205.270; N.H. Rev. Stat. § 636:1; N.J. Stat. 2c:15-1; N.M. Stat. § 30-16-2,; N.Y. Penal Law § 160.00; N.C. Gen. Stat. § 14-87.1; N.D. Cent. Code § 12.1-22-01; Ohio Rev. Code § 2911.01; Okla. Stat. Tit. 21, § 797; Ore. Rev. Stat. § 164.415; 18 Pa. Cons. Stat. § 3701; R.I. Gen. Laws § 11-39-1; S.C. Code § 16-11-325; S.D. Codified Laws § 22-30-1; Tenn. Code § 39-13-401; Tx. Penal Code § 29.02; Utah Code § 76-6-301; Vt. Stat. Tit. 13, § 608; Va. Code § 18.2-90; Wash. Rev. Code § 9a.56.190; W. Va. Code, § 61-2-12; Wis. Stat. § 943.32; Wyo. Stat. § 6-2-401.

Revolutionary War, robberies similar to petitioner's were prosecuted at common law.[3]

Petitioner's offense took place entirely within Ohio, and Ohio law provides for its punishment. Ohio Rev. Code § 2911.01.[4] The decision below provides no reason why the federal government should be able to strip Ohio, or any other State, of its authority to prosecute violent offenses occurring entirely within its borders. But that is the implication of the decision below, since Congress may preempt the States from regulating in any area that Congress itself may regulate pursuant to its enumerated powers. U.S. Const. art. VI; see also *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 30 (1996).

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[3] *E.g.*, *Phippard* v. *Forbes*, 4 H. & McH. 481 (Md. Prov., April Term 1721) (conversion and embezzlement of assets); *Smith* v. *Brown*, 1 Va. Colonial Dec. R1 (Va. Gen. 1729) (discussing "whether a man that is robbed after Convicting the Party may have an Action for Trespass for his goods"); *Hannaball* v. *Spalding*, 1 Root 86 (Conn. Super. 1783) (indictment "for stealing a handkerchief"); *State* v. *David*, 1 Del. Cas. 160 (Del. Quar. Sess. 1797) ("Defendant had been indicted for stealing two barrels of herrings"); *Neal* v. *Lewis*, 2 Bay 204, 2 S.C.L. 204 (S.C. Const. App. 1798) ("[t]heft, mentioned in the third count, is a felony, which, when committed under some circumstances, would affect a man's life").

[4] Providing in relevant part, "(A) No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * * (3) Inflict, or attempt to inflict, serious physical harm on another * * * (C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

Our nation's long tradition of regulating local matters locally ultimately serves as a check on governmental excesses and a safeguard for individual liberty. Citizens who dislike the manner in which their state representatives approach criminal justice can vote for candidates with different viewpoints. Relocating local law-making authority in the federal government would not only make addressing purely local concerns impossible, it would frustrate citizens' rights and dilute their opportunities to oust disfavored representation. "[T]he boundaries between the spheres of federal and state concern would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). "The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Ibid.* As the Court observed in *New York* v. *United States*, 505 U.S. 144 (1992), "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* at 181 (citation and internal quotation marks omitted).

Moreover, allowing federal prosecutors to shift offenders from the state system into the federal system can have "dramatic penal consequences because states generally take more lenient, flexible, and creative approaches to sentencing than the federal system." Steven F. Smith, *Proportionality & Federalization*, 91 Va. L. Rev. 879, 893 (2005). Under a system of limited federal powers, "state governments also may find that they are able to enforce criminal laws and regulations of social mores less coercively than

the national government because of the lower costs and greater ease of monitoring citizen behavior in a smaller jurisdiction." Steven G. Calabresi, *A Government of Limited & Enumerate Powers: In Defense of* United States v. Lopez, 94 Mich. L. Rev. 752, 756 (1995).

Although all States criminalize violent theft, they take widely varying approaches. This kind of diversity and experimentation by individual States leads to more effective methods of punishment for the nation as a whole.[5] As Justice Kennedy has observed, a federal statute that criminalizes local violence "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); see also McConnell, 54 U. Chi. L. Rev. at 1498-1500.

Instead of taking over prosecution of local robberies, the federal government should "better focus its resources and unique expertise on truly 'federal' matters and, where possible, leave enforcement of general criminal laws to the States." *United States* v. *Rutherford*, 236 Fed. Appx. 835 (3d Cir. 2007) (dis-

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[5] State robbery statutes, for example, have been continually revised. Formerly under Ohio law, making a forceful escape after theft could be prosecuted as robbery. Now, however, to constitute robbery, the force must have been done in the taking and not in the escape. See *State* v. *Strear*, 25 Ohio Dec 277 (Ohio Ct. Comm. Pl. 1910); *Hanson* v. *State*, 1 N.E. 136 (Ohio 1885). And just this year, the Ohio Supreme Court held that theft is a lesser included offense of robbery, rejecting the possibility of a defendant being convicted of both theft and robbery for a single taking. *State* v. *Smith*, 884 N.E.2d 595 (Ohio 2008).

agreeing with *de minimis* standard under the Hobbs Act, but considering itself bound by *stare decisis*); Police Exec. Research Forum, *Position on Federalism*, quoted in Am. Bar Ass'n Task Force on the Federalization of Crim. Law, *The Federalization of Crim. Law* 41 n.72 (1998) (criticizing trend of federalizing routine crime because it "diverts federal authorities from what they do best and puts more distance between law enforcers and local community residents—in direct conflict with community policing objectives").

The problem with the *de minimis* standard is that it takes none of this into account. One cannot determine what is within Congress's domain without considering what is not. "The Constitution," after all, "requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. The Founders made a considered decision to adopt a federal system, and it has served us well. But ensuring its continued vitality means that this broadest of all federal powers—the power to regulate interstate commerce—cannot be delimited entirely by testing for what is *not national*; the analysis must also consider whether something *is local*. Commerce Clause analysis should not be a treasure hunt. Nor should federal jurisdiction depend on an interstate ingredient sitting on the shelf behind a local crime. This Court's guidance is needed to make that clear.

II. The Decision Below Is Contrary To Both Congressional Intent And Constitutional Clear-Statement Rules.

Certiorari is also warranted because the overbroad application of the Hobbs Act approved by the court below is contrary to the considered judgment of Congress. Acts of Congress are presumed constitu-

tional. See *Morrison*, 529 U.S. at 607. And, notwithstanding this Court's ultimate obligation to say what the Constitution means, if Congress had made detailed factual findings connecting robberies like the one at issue here with protection for interstate commerce, the Court would need to decide what level of deference to accord Congress's judgment. See *id.* at 614; *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). In this case, however, deference cuts *against* the decision below because Congress itself would have disapproved of using the Hobbs Act to federally prosecute local robberies such as petitioner's.

In other words, there is no reason to worry about stepping on Congress's toes—and every reason to enforce a narrower construction of the statute than that adopted below. As this Court has recognized in several recent cases, the Commerce Clause constrains expansive interpretations of federal law. See, *e.g.*, *Jones*, 529 U.S. at 857-858 (federal arson statute should not be interpreted to make every arson a federal crime); *Solid Waste Ag. of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159, 173-174 (2001) (no deference to administrative interpretation that would allow regulation of intrastate ponds used by migratory birds); see also *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality) (rejecting interpretation of "waters of the United States" as applying to channels that intermittently provide drainage for rainfall). The Court should grant certiorari to rein in the federal government's expansive use of the Hobbs Act, which is inconsistent not only with the Commerce Clause, but also with congressional intent and settled clear-statement rules that minimize constitutional adjudication and protect federalism.

A. The Hobbs Act Was A Limited Amendment To The Anti-Racketeering Act, Never Intended To Apply To Local Robberies.

The decision below is contrary to the enacting Congress's purpose in passing the Hobbs Act, as well as that Congress's contemporaneous understanding of the Commerce Clause.

Congress did not intend to reach local robberies such as petitioner's or otherwise to interfere in matters of traditional state concern. To the contrary, the Hobbs Act was a targeted response to this Court's decision in *United States* v. *Local 807*, 315 U.S. 521 (1942), which held that the 1934 Anti-Racketeering Act did not apply to members of a truck drivers' union who extorted payments from *out-of-state* drivers attempting to deliver goods to New York City. As the Court explained in *Enmons*: "Congressional disapproval of this decision was swift. Several bills were introduced with the narrow purpose of correcting the result in the *Local 807* case. * * * [T]he limited effect of the bill was to shut off the possibility * * * that union members could use their protected status to exact payments from employers for imposed, unwanted, and superfluous services." 410 U.S. at 402-403 (internal footnotes omitted).

To close this gap, Congress proposed "an amendment of the existing antiracketeering law," which itself "was passed in an effort to eliminate racketeering in relation to interstate commerce, *of concern to the Nation as a whole*." H.R. Rep. No. 79-238, at 1 (1945) (emphasis added). The purposes of this amendment were "(1) to prevent interference with interstate commerce by robbery or extortion * * *, and (2) to prevent interference during the war with the trans-

portation of troops, munitions, war supplies, or mail in interstate or foreign commerce." *Ibid.* As half of the Fifth Circuit recognized after a detailed review, the legislative history confirms "that Congress in enacting the Hobbs Act was concerned with protecting against relatively direct obstruction of the actual movement of goods in interstate commerce, and did not contemplate its application to robberies of local retail stores such as those here." *McFarland*, 311 F.3d at 387 (Garwood, J., dissenting from *per curiam*); see also, *e.g.*, 89 Cong. Rec. 3202 (1943) (Statement of Rep. Walter) ("it is the intention of the Committee on the Judiciary to enact legislation for one purpose, and one purpose alone, namely, to correct the unfortunate decision in the *Local 807* case"); 91 Cong. Rec. 11912 (1943) (Statement of Rep. Michener) (rejecting applications of the bill to "conditions * * * where [union members] meet and overturn milk trucks and do other things like that," insisting instead that, "[t]his bill applies to interstate commerce only").

Perhaps most telling is that, in prohibiting the kind of extortion and robbery that impedes the flow of commerce across state lines, Congress understood itself to be taking a step that the States could not take. *E.g.*, H.R. Rep. 79-238 at 11 ("The Congress does not need to be reminded that the Constitution of the United States confers on it the exclusive and unlimite[d] power to regulate interstate commerce."); see also *United States* v. *Culbert*, 435 U.S. 371, 380 (1978) ("Congress apparently believed * * * that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so.") (citing legislative history). This modest purpose for

the Hobbs Act is consistent with the understanding of the Commerce Clause prevailing at the time. When the Act was passed, "the federal government's commerce power was generally viewed far less expansively than it later came to be." *McFarland*, 311 F.3d at 383 (Garwood, J., dissenting from *per curiam*). Congress was simply attempting to reverse the effect of the *Local 807* decision, and it used a definition of "commerce" that was essentially identical to that in the 1934 Act. See *id.* at 384 n.16 (comparing the two provisions).

"This Court presumes that Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment." *Director, Office of Workers' Compensation Programs* v. *Greenwich Colliers*, 512 U.S. 267, 268 (1994). Moreover, where "[Congress] used the same words, [the Court] can only assume it intended them to have the same meaning that courts had already given them." *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Under these circumstances, giving sweeping effect to the Hobbs Act is just bad statutory interpretation. This Court's review is needed to ensure that Congress's intent in enacting the Hobbs Act is not thwarted.

B. Application Of The Hobbs Act To Ordinary Local Robberies Is Contrary To Constitutional Clear-Statement Rules Designed To Protect Federalism And Avoid Unnecessary Constitutional Adjudication.

An expansive application of the Hobbs Act is also contrary to constitutional clear-statement rules. In addition to advising adherence to the general rule of avoiding constitutionally questionable interpretations

of statutory law, this Court has said repeatedly—and in decisions applying the Hobbs Act—that "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. * * * [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Enmons*, 410 U.S. at 411-412 (quotation omitted); accord *Jones*, 529 U.S. at 858; *Rapanos*, 547 U.S. at 738 (plurality).

Enmons specifically held that the language of the Hobbs Act does not meet this standard:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes [a traditionally local matter]. *Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work * * * such an unprecendented incursion into the criminal jurisdiction of the States.*

410 U.S. at 411 (emphasis added).

If the Hobbs Act had altered the traditional federalism balance through an expansion of federal jurisdiction, an immediate and substantial effect would have been observed. But it was not. Indeed, the 1934 Act has never been applied to robberies of local retail stores, and the federal government did not seek to prosecute actual or threatened violence under the Hobbs Act until the 1970s. *Enmons*, 410 U.S. at 409;

McFarland, 311 F.3d at 383 (Garwood, J., dissenting from *per curiam*). As the Court observed in *Enmons*, "[i]t is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." 410 U.S. at 410.

The federal government's expansive reading of the Hobbs Act is thus a relatively recent development. In this case, it was the presence of out-of-state ingredients at the crime scene that purportedly established federal jurisdiction over a run-of-the-mill robbery of the sort that Ohio itself has prosecuted for more than two centuries. But the decision below does not stand alone. Courts in other cases have applied the Act if the injured business had previously purchased supplies from out-of-state, sent a percentage of its profits to an out-of-state headquarters, hired employees from out-of-state, sold products or services to out-of-state customers, or received insurance proceeds from an out-of-state insurer.[6]

The Eighth Circuit recently held that the Act applied to the robbery of several drinking establishments (*i.e.*, bars), since the bars sold out-of-state beer. See *United States* v. *McAdory*, 501 F.3d 868,

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[6] See, *e.g.*, *United States* v. *Clausen*, 328 F.3d 708 (3d Cir. 2003) (restaurant advertised in out-of-state newspaper, and had out-of-state employees, musicians, and customers); *United States* v. *Nutall*, 180 F.3d 182 (5th Cir. 1999) (part of a nationwide company that cashed checks and sold money orders); *United States* v. *Hickman*, 179 F.3d 230 (5th Cir. 1999) (companies either purchased products out-of-state or transferred their profits to out-of-state national headquarters); *United States* v. *Juvenile Male*, 118 F.3d 1344 (9th Cir. 1997) (business sent percentage of profits to out-of-state headquarters, and used out-of-state distributors for food, paper and plastic products, and uniforms).

871 (8th Cir. 2007). Since out-of-state beer is sold at every bar in the country, the Eighth Circuit's theory would permit Congress to criminalize any barroom brawl that might disrupt business. Straying almost as far from reason, the Second Circuit has held the Act applicable to a defendant who stole money from an undercover officer because the theft left the officer with less money to buy cocaine in future sting operations—and cocaine, of course, is a commodity that travels in interstate commerce. *United States* v. *Jones*, 30 F.3d 276, 285 (2d Cir. 1994).

The courts are thus becoming comfortable using the *de minimis* standard to fish for a federal factor; and it is not clear what falls outside the federal domain on the reasoning of decisions such as the one below. Lacking the courage of their convictions, other courts that follow the *de minimis* standard nonetheless purport to distinguish robberies of individuals. See, *e.g.*, *United States* v. *Lynch*, 282 F.3d 1049, 1052-1055 (9th Cir. 2002); *United States* v. *Wang*, 222 F.3d 234, 238-240 (6th Cir. 2000). The theory that caught petitioner, however, admits of no such exception. His conviction was upheld simply because pizza ingredients from out of state were present at the crime scene, not because he stole any Wisconsin cheese, California sauce, or Minnesota flour.

Surely the burned-down house in *Jones* contained out-of-state goods, yet this Court concluded that the federal arson statute "is not soundly read to make virtually every arson in the country a federal offense." 529 U.S. at 859. Instead, the Court concluded that "[under] *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the 'traditionally local criminal

conduct' in which petitioner Jones engaged 'a matter for federal enforcement.'" *Id.* at 858 (quoting *United States* v. *Bass*, 404 U.S. 336, 350 (1971)). Likewise here, the scope of the Hobbs Act should be narrowed, consistent with the "guiding principle" that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter." *Id.* at 857 (citations omitted).

For the reasons discussed above—the Commerce Clause problems posed by the *de minimis* standard; the narrow purpose of the Hobbs Act; the enacting Congress's understanding of the Commerce Clause; the requirement that significant changes to the federal-state balance be supported by clear statements of congressional intent; this Court's narrow interpretation of the Hobbs Act in *Enmons*; and the canon of constitutional avoidance—the Hobbs Act should not be construed to reach conduct such as petitioner's. This Court's review is needed to cut the Hobbs Act back to the size that Congress intended—and the Constitution permits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

RAJAH BAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether more than a de minimis impact on interstate commerce is required for a robbery to serve as the basis for a conviction under the Hobbs Act.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files amicus curiae briefs on a broad range of issues in this Court and other courts.

INTRODUCTION

The Court should grant the petition and review this case because allowing a robbery's de minimis impact on interstate commerce to suffice as grounds for a Hobbs Act conviction is contrary to this Court's Commerce

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Pursuant to Rule 37.2(a), counsel provided all parties with notice of amicus curiae's intention to file this brief more than 10 days prior to the brief's due date. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

Clause jurisprudence. Moreover, such a rule inappropriately federalizes local crime.

The Hobbs Act forbids "in any way or degree obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. § 1951(a). The criminal conduct at issue in this case—stealing $538 from a Little Caesar's restaurant in Cleveland, Ohio—had at most a de minimis effect on interstate commerce. The restaurant bought supplies from a distributor in Columbus, Ohio, that in turn purchased them from businesses in other states; yet how much of the $538 might have—eventually—made its way into interstate commerce was not demonstrated. Nevertheless, the Sixth Circuit determined that no more than a de minimis impact on interstate commerce had to be shown to sustain the conviction. Pet. App. 5a.

Congress may use its Commerce Clause authority to regulate activity that substantially affects interstate commerce. *See, e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). However, in determining whether an activity actually does substantially affect interstate commerce, the effects of the entire class of activity can only be aggregated if the activity is itself "economic." *Id.* at 25; *United States* v. *Morrison*, 529 U.S. 598, 612-13 (2000). The robbery in this case, like any other robbery, was not itself an economic activity involving the production, distribution, or consumption of commodities. Because this individual robbery did not substantially affect interstate commerce, it was not a proper basis for a federal Hobbs Act prosecution.

The Sixth Circuit's decision—allowing the Hobbs Act to encompass robberies with a de minimis effect on interstate commerce—thus conflicts with this Court's

holdings in *Raich* and *Morrison*. Yet the importance of this issue goes beyond this case or even Hobbs Act cases in general. Other federal criminal statutes include similar jurisdictional elements that proscribe conduct based on an effect on interstate commerce. Even post-*Raich*, lower courts are split on the extent to which non-economic conduct must affect interstate commerce in order to fall within the reach of these statutes. This case presents an opportunity for the Court to resolve the confusion and reiterate that when Congress attempts to regulate activity on the basis that it substantially affects interstate commerce, the effects of non-economic conduct may not be aggregated in order for that conduct to fall within the scope of the prohibition.

Moreover, the de minimis rule applied by the Sixth Circuit inappropriately allows federal prosecutors to bring federal charges in cases that have no distinctly federal interest at stake. Such a rule permits Hobbs Act prosecutions based on robberies that had no greater effect on interstate commerce than most robberies prosecuted under state law. Thus, defendants committing indistinguishable offenses with de minimis interstate effects may face significantly different consequences depending on whether they happen to be charged in a state or federal forum. Not only does this practice create seemingly random disparities in sentencing, but it essentially reduces federalism in the criminal justice system to a matter of prosecutorial discretion. The Court should grant the petition in this case in order to reject the de minimis rule and ensure that federal Hobbs Act prosecutions are limited to offenses that actually affect the federal interest in protecting interstate commerce.

REASONS FOR GRANTING THE WRIT

I. THE DE MINIMIS RULE CONFLICTS WITH THIS COURT'S CLEAR GUIDANCE ON CONGRESS'S COMMERCE CLAUSE POWERS

The Court should grant the petition for review because the Sixth Circuit's analysis conflicts with this Court's firmly established Commerce Clause jurisprudence. Under *Gonzales* v. *Raich*, 545 U.S. 1 (2005) and *United States* v. *Morrison*, 529 U.S. 598 (2000), Congress may use its authority under the Commerce Clause to regulate *non-economic* intrastate activity—including crimes such as robbery—only to the extent that individual instances of that activity substantially affect interstate commerce. Thus, an individual robbery's de minimis impact on interstate commerce is insufficient to serve as a basis for a criminal conviction under the federal Hobbs Act.

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As noted in *Raich*, this Court's "understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time." 545 U.S. at 15-16. Despite this evolution, the Court has consistently found that the Commerce Clause provides Congress with the power to engage in three categories of regulation. "First, Congress can regulate the channels of interstate commerce." *Id.* at 16 (citing *Perez* v. *United States*, 402 U.S. 146, 150 (1971)). "Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce." *Id.* at 16-17 (citing *Perez*, 402 U.S. at 150). "Third, Congress has the power to regulate activities

that substantially affect interstate commerce." *Id.* at 17 (citing *Perez*, 402 U.S. at 150, and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

In *Raich* and *Morrison*, as in this case, only the third category of Commerce Clause regulation was relevant: regulation of activities that substantially affect interstate commerce. 545 U.S. at 17; 529 U.S. at 609. Where the Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611. Accordingly, Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617.

In *Morrison*, the Court struck down a federal statute that imposed civil liability on anyone committing "crimes of violence motivated by gender." 529 U.S. at 605, 617. While not explicitly defining the scope of "economic" activity, the Court stated that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. The Court thus rejected the contention that Congress could regulate gender-motivated violence under the Commerce Clause, even though Congress found that such violence would have an impact on various aspects of interstate commerce. *Id.* at 614.

This critical distinction between economic and non-economic activity was decisive in *Raich*, the most recent case in which this Court has addressed the limits on Congress's Commerce Clause powers. In that case, the Court considered the validity of portions of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801 *et seq.*, that prohibited the cultivation or possession of

marijuana. *Raich*, 545 U.S. at 12-15. A group of marijuana users and growers in California argued that Congress lacked the power to apply the CSA's prohibitions to non-commercial, intrastate cultivation or possession of marijuana for medical purposes. *Id.* at 15.

The Court upheld the CSA's prohibitions as a valid exercise of Congress's power to regulate activities substantially affecting interstate commerce. 545 U.S. at 32-33. As the Court explained, Congress can regulate "purely local activities" if those activities are part of "an economic 'class of activities'" that in the aggregate has "a substantial effect on interstate commerce." *Id.* at 17. Accordingly, where Congress passes a general regulatory statute governing activities that as a class are within the reach of federal power, the regulatory regime properly governs even trivial or de minimis individual instances within that class of activities. *Id.* at 17, 23.

The Court found that because the CSA had the purpose of "control[ling] the supply and demand of controlled substances in both lawful and unlawful drug markets," Congress could legitimately regulate even intrastate activity under its Commerce Clause power. 545 U.S. at 19. "[T]he regulation is squarely within Congress' commerce power because production of [a] commodity meant for home consumption ... has a substantial effect on supply and demand in the national market for that commodity." *Id.* In other words, because the CSA created "a comprehensive framework for regulating the production, distribution, and possession" of controlled substances, *id.* at 24, even "trivial" individual activities subject to that framework would not be exempt from federal regulation, *id.* at 23.

Notably, the Court explicitly premised its holding on the "economic" nature of the activities regulated by the CSA. Filling in a doctrinal gap that had remained after *Morrison*, the Court defined the scope of "economic" activity for Commerce Clause purposes as "'the production, distribution, and consumption of commodities.'" 545 U.S. at 25 (quoting *Webster's Third New International Dictionary* 720 (1966)). Because "the activities regulated by the CSA are quintessentially economic," the Court found that the CSA was not subject to the same constitutional infirmities that doomed the civil statute in *Morrison*. *Id.* at 25-26.

The contrast between *Raich* and *Morrison* makes clear that Congress's ability to regulate activities with a substantial effect on interstate commerce applies much more broadly to economic activities than to non-economic activities. If criminal activity involves "the production, distribution, and consumption of commodities," 545 U.S. at 26, Congress can regulate that activity—even at the intrastate level—based on the aggregate effect of the activity on interstate commerce, *id.* at 18-19; *Morrison*, 529 U.S. at 611. Individual instances of such economic activity are still subject to regulation, even if they appear trivial or de minimis. *Raich*, 545 U.S. at 17, 23. However, non-economic criminal activity—crimes not involving "the production, distribution, and consumption of commodities," *id.* at 26—cannot be regulated by Congress based solely on that activity's aggregate effect on interstate commerce, *id.* at 25-26; *Morrison*, 529 U.S. at 617.

The criminal activity in *Raich* was "quintessentially economic" because it involved "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." 545 U.S. at 26. Congress's regulation of intra-

state activity was proper because "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id.*

By contrast, robbery cannot be accurately described as an "economic" activity under the definition set forth in *Raich*.[2] The Hobbs Act defines robbery as follows:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1). The Act thus regulates the use of force, violence, or fear of injury to obtain any sort of personal property from another individual. On its own, the use of force, violence, or fear of injury would have no connection to the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26. The only way that robbery under the Hobbs Act could even

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[2] While Courts of Appeals have occasionally stated that they consider robbery to be an "economic" crime, it appears that none of them has reached this conclusion based on the definition of "economic" activity that was critical to the holding in *Raich*. *See, e.g.*, *United States* v. *Jimenez-Torres*, 435 F.3d 3, 7-8 (1st Cir. 2006); *United States* v. *Malone*, 222 F.3d 1286, 1295 (10th Cir. 2000). Moreover, even where robbery involves a transfer of money, the crime does not inherently have an effect on interstate commerce. *See, e.g.*, *United States* v. *Wang*, 222 F.3d 234, 240 & n.2 (6th Cir. 2000) (finding that "the effect ... did not rise even to the level of de minimis" when $4,200 was taken during a robbery).

theoretically be considered an "economic" activity under *Raich* is if depriving the victim of "personal property" would be considered the "distribution" of a "commodity." Yet "personal property" is not a commodity regulated by Congress. While the CSA provisions in *Raich* were part of a comprehensive regulation of the controlled substances market, the Hobbs Act is not part of "a comprehensive framework for regulating the production, distribution, and possession" of personal property. *Id.* at 24. While robbery may have superficial similarities to voluntary transactions, in that an item shifts from one person's possession to another's, no "national market" in personal property is being affected. Robbery fails to qualify as an "economic" activity under *Raich*.

Thus, because robbery does not meet *Raich*'s definition of economic activity, the effects of all robberies nationwide cannot be aggregated in order to determine whether "robbery" as a category substantially affects interstate commerce. While Congress can regulate robbery that does substantially affect interstate commerce, that attempt at regulation cannot simply extend to all robberies at the intrastate level, regardless of the impact each robbery has on interstate commerce. *See Morrison*, 529 U.S. at 617 (stating that Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). As a non-economic activity, each individual robbery must itself have some substantial impact on interstate commerce in order to fall subject to Congressional regulation.

Allowing an individual robbery's "de minimis" impact on interstate commerce to serve as the basis for a Hobbs Act conviction, as the Sixth Circuit did in this case, is therefore inconsistent with this Court's analysis

of Congress's Commerce Clause authority. The petition for certiorari should be granted so that the Court may clarify to lower courts that, under the definition set forth in *Raich*, robbery is a non-economic activity. A robbery that does not itself substantially affect interstate commerce—such as taking $538 from a Little Caesar's in Cleveland, especially when the restaurant buys its supplies from a distributor elsewhere in Ohio—is therefore not subject to federal prosecution.

II. Lower Courts Have Split On Whether The De Minimis Rule Can Apply Under Federal Criminal Statutes That Require An Effect On Interstate Commerce

As the above discussion demonstrates, the Constitution does not allow a Hobbs Act conviction to be premised on a robbery with a de minimis impact on interstate commerce. The need for greater clarity on this issue is not confined merely to Hobbs Act prosecutions, however. Numerous other federal criminal statutes, a few of which are discussed in this section, include similar jurisdictional elements that require some level of impact on interstate commerce in order to sustain a conviction. However, lower courts have at times split on the question of whether more than a de minimis impact is required for these statutes to be constitutionally applied to non-economic activity. Courts construing these statutes often explicitly rely on Hobbs Act cases in analyzing the extent to which interstate commerce must be affected. *See, e.g.*, *United States* v. *Fernandez*, 388 F.3d 1199, 1218 (9th Cir. 2004); *United States* v. *Riddle*, 249 F.3d 529, 537 (6th Cir. 2001); *United States* v. *Grassie*, 237 F.3d 1199, 1208-1209 (10th Cir. 2001); *United States* v. *Feliciano*, 223 F.3d 102, 118 (2d Cir. 2000); *United States* v. *Juvenile Male*, 118 F.3d 1344,

1347-1348 (9th Cir. 1997). Thus, granting the petition in this case will allow the Court to provide guidance on the proper application of the de minimis rule and resolve the lower courts' confusion.

A. Racketeer Influenced And Corrupt Organizations (RICO)

The federal RICO statute, 18 U.S.C. § 1962, prohibits a variety of actions related to "pattern[s] of racketeering activity." For example, anyone who has received income derived from a pattern of racketeering activity cannot use that income to acquire an interest in an enterprise that is engaged in or affecting interstate commerce. *Id.* § 1962(a). No one may use a pattern of racketeering activity to acquire or maintain an interest in, or control of, an enterprise that is engaged in or affecting interstate commerce. *Id.* § 1962(b). Additionally, no one employed by or associated with an enterprise that is engaged in or affecting interstate commerce may participate in the conduct of that enterprise's affairs through a pattern of racketeering activity. *Id.* § 1962(c).

The scope of the RICO prohibitions are potentially quite broad, as demonstrated by the definitions of several relevant terms. "[R]acketeering activity" includes a long and varied list of dozens of federal offenses, such as bribery, fraud, false statements in passport applications, retaliation against witnesses, and trafficking in persons. 18 U.S.C. § 1961(1). However, racketeering activity also includes certain offenses chargeable under state law, including "murder, kidnapping, gambling, ar-

son, robbery, bribery, [and] extortion." *Id.*[3] Moreover, the definition of "enterprise" includes not just legal entities such as corporations and partnerships, but also "any ... group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

Thus, the innumerable possible combinations of "racketeering activities" and "enterprises" include many pairings that would feature no "economic" activity under the *Raich* definition. For example, many of the state law offenses, such as murder and kidnapping (and, as discussed above, robbery) do not involve the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26. Similarly, a wide variety of "group[s] of individuals associated in fact"—deemed "enterprises" for RICO purposes—might often have no economic component to their organizational activities; groups ranging from street gangs to church choirs can easily exist without participating in the economy as associations.

In some instances, then, the RICO offenses listed in Section 1962 could prohibit non-economic racketeering activity from occurring in connection with a non-economic enterprise. For example, under the language of Section 1962(c), an individual "associated with" a street gang could be prosecuted for "participat[ing] ... in the conduct of" that gang's activities through a pattern of murders. *E.g.*, *Waucaush* v. *United States*, 380 F.3d 251, 253 (6th Cir. 2004) (internal quotation marks omitted). At the same time, the RICO offenses all require that some tie to interstate commerce be demonstrated--i.e., a showing that the enterprise either en-

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[3] A "pattern of racketeering activity" must involve at least two separate acts of racketeering activity within a ten year period. 18 U.S.C. § 1961(5).

gaged in or affected interstate commerce. While the RICO statute does not specify the degree to which an enterprise must affect interstate commerce, the Constitution requires a substantial effect on commerce in order for federal regulation to be appropriate. *Raich*, 545 U.S. at 17. Moreover, where non-economic activity is involved, *Raich* and *Morrison* require that individual instances of the prohibited activity must *each* substantially affect interstate commerce; such activity may not be viewed in the aggregate to determine whether it substantially affects interstate commerce. *Id.* at 25-26; *Morrison*, 529 U.S. at 617.

The Sixth Circuit recognized this requirement in *Waucaush*, in which it addressed RICO charges premised on non-economic gang activity, including murders. 380 F.3d at 253, 256. The court stated that "where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do." *Id.* at 256. The court found no evidence that the gang's activities had "substantial effects on interstate commerce," even though the murders "surely affected interstate commerce in some way—a corpse cannot shop, after all." *Id.* at 258. Accordingly, no violations of RICO had occurred. *Id.*

However, the First Circuit, while "reluctant to create a circuit split," rejected the *Waucaush* analysis and held that all racketeering activity may be aggregated for Commerce Clause purposes. *United States* v. *Nascimento*, 491 F.3d 25, 30, 43 (1st Cir. 2007). Like *Waucaush*, this case also involved a pattern of murders by a gang that did not engage in any "economic" activity as a gang. *Id.* at 30-31, 37. Yet the First Circuit found the absence of "an economic motive" to be "of little significance," stating that Congress can criminalize an economic "'class of conduct'" regardless of the "'economic

facts'" of individual conduct falling under the statute. *Id.* at 42 (emphasis omitted) (quoting *United States* v. *Morales-de Jesús*, 372 F.3d 6, 18 (1st Cir. 2004)). The court asserted that "[r]acketeering activity, as a general matter, is based largely on greed." *Id.* at 43 (citing 1 *Timothy* 6:10 ("[T]he love of money is the root of all evil.")). The Court therefore found that the "class of [racketeering] activity is sufficiently economic in nature that it may be aggregated for Commerce Clause purposes." *Id.* (citing *Perez*, 402 U.S. at 154).

Granting the petition in this case would allow the Court to resolve the conflict between lower courts by clarifying that a de minimis effect on interstate commerce cannot support a conviction premised on non-economic activity.

B. Civil Disorder

An effect on interstate commerce is also an element of 18 U.S.C. § 231, which prohibits a variety of actions in connection with civil disorder. For example, the statute forbids teaching or demonstrating any "technique capable of causing injury or death to persons, knowing ... that the same will be unlawfully employed for use in ... a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce." *Id.* § 231(a)(1). Similarly, the statute also prohibits interfering with any fireman or law enforcement officer engaged in his official duties "during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce." *Id.* § 231(a)(3).

Lowers courts have not shed much light on the extent to which a civil disorder must affect interstate commerce in order for regulation under this section to be a valid exercise of Congress's Commerce Clause

powers. *See, e.g., United States* v. *Featherston*, 461 F.2d 1119, 1123 (5th Cir. 1972) ("The argument that Congress exceeded its power under the Commerce Clause in enacting § 231(a)(1) fails to rise to the level of a substantial constitutional question and is rejected.") (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964)). However, a "civil disorder" does not self-evidently involve the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26. Similarly, many of the activities that this section purports to proscribe do not meet *Raich*'s definition of economic activity, such as teaching a "technique capable of causing injury" or interfering with a law enforcement officer. Under *Raich* and *Morrison*, therefore, Congress cannot regulate such non-economic activities based solely on their aggregate impact on interstate commerce. *Raich*, 545 U.S. at 25-26; *Morrison*, 529 U.S. at 617. Instead, each instance of non-economic conduct must substantially affect interstate commerce in order for this statute to validly prohibit it.

Thus, the de minimis rule used by some courts in Hobbs Act and RICO cases would also be improper for some prosecutions brought under § 231. The Court should grant the petition in this case to clarify that non-economic activity cannot be aggregated in order to determine whether the activity substantially affects interstate commerce.

C. Damage To Religious Property; Obstruction Of Persons In The Free Exercise Of Religious Beliefs

Under 18 U.S.C. § 247(a)(1), "intentionally defac[ing], damag[ing], or destroy[ing] any religious real property, because of the religious character of that property" is a crime if the offense "is in or affects inter-

state or foreign commerce," *id.* § 247(b). Similarly, "intentionally obstruct[ing], by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs" is a crime under § 247(a)(2), if the offense "is in or affects interstate or foreign commerce," *id.* § 247(b). Citing Hobbs Act case law, at least one Court of Appeals has opined that § 247 proscribes conduct that has only a de minimis effect on interstate commerce. *See Grassie*, 237 F.3d at 1208-1209.

Like the Hobbs Act, § 247 does not criminalize any economic activity involving the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26. Rather, the statute addresses only property damage and interference with religious practices. Thus, when conduct falls within § 247 because it "affects" interstate commerce (rather than because it "is in" commerce), that non-economic activity cannot be aggregated in order to determine whether congressional regulation is proper. *Cf. United States* v. *Ballinger*, 395 F.3d 1218, 1227 & n.4 (11th Cir. 2005) (en banc) (finding that a string of church arsons were "in" interstate commerce and thus declining to "address the question ... of whether any effects the church burnings might have on commerce may be aggregated" to determine if commerce was "*affected*").

More than a de minimis effect on interstate commerce must therefore occur before an individual violation of § 247 can be reached by Congress's Commerce Clause power. By granting the petition and clarifying the impact on interstate commerce that is required under the Hobbs Act, this Court would provide valuable guidance to lower courts applying § 247.

III. The De Minimis Rule Grants Federal Prosecutors Inappropriate Discretion

The Constitution does not allow a non-economic activity's de minimis impact on interstate commerce to serve as the basis for a conviction under the Hobbs Act (or the other federal statutes discussed in Section II). This rule is more than just a mere doctrinal wrinkle in cases such as *Raich* and *Morrison*—it is a necessary principle for constraining federal prosecutions to their proper role in the American criminal justice system. Abandoning this rule by permitting de minimis effects on interstate commerce to create federal jurisdiction over non-economic crimes would grant prosecutors inappropriate discretion over matters of federalism and uniformity in punishment.

In general, "preventing and dealing with crime is much more the business of the States than it is of the Federal Government." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977) (citing *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (plurality opinion)). To preserve this relationship between the components of the criminal justice system, the creation of a criminal offense under federal law should be accompanied by "an identification of the strong national interest that requires a federal prohibition." Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L. J. 825, 840 (2000). When no "distinct federal interest" exists to justify the federal statute, or when the statute encompasses additional conduct unrelated to the federal interest, then "the decision to prosecute can lack a guiding federal principle. ... Restraint is essentially left to self-imposed prosecutorial discretion." American Bar Ass'n, Criminal Justice Section, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 33 (1998).

In the case of the Hobbs Act, which is premised on Congress's Commerce Clause authority, the statute's purpose was "to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Because robbery is a non-economic activity, Congress can only regulate that activity when it has a substantial effect on interstate commerce, as discussed in Section I. *Raich*, 545 U.S. at 25-26; *Morrison*, 529 U.S. at 617. If this constitutional limit is not enforced, and the de minimis rule is allowed to stand, prosecutors will be able to bring federal charges under the Hobbs Act where no discernable interference with interstate commerce actually occurred.

In such cases—including this one—no distinct federal interest in prosecution is evident. Even when these cases are tried in federal courts, they serve no purpose that is different from prosecutions by state authorities. If the Court condones this state of affairs, "federalism concerns would become part of prosecutorial discretion." Brown, *Constitutionalizing the Federal Criminal Law Debate:* Morrison, Jones, *and the ABA*, 2001 U. Ill. L. Rev. 983, 990. Yet prosecutorial discretion inherently takes into account factors other than constitutional concerns about federalism, such as a case's deterrent value and the government's enforcement priorities. *See, e.g., Wayte* v. *United States*, 470 U.S. 598, 607 (1985). Thus, even though the Department of Justice has instituted policy guidelines for bringing Hobbs Act robbery prosecutions, those guidelines reflect the Department's own priorities: "The robbery offense in 18 U.S.C. § 1951 is to be utilized only in instances involving organized crime, gang activity, or wide-ranging schemes. In certain circumstances [i.e., labor-management disputes], the appropriate section of

the Criminal Division must be consulted before prosecution is initiated." U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-131.040 (1997). Notably, this policy statement fails to restrict prosecutions to those robberies having a discernable effect on the real federal interest behind the statute—namely, the protection of interstate commerce. Unsurprisingly, prosecutorial guidelines cannot replace courts as adequate guarantors of limits on federal prosecutions of local robberies.

Moreover, when federal prosecutors bring Hobbs Act charges based on events that had no more than a de minimis impact on interstate commerce, some other factor will necessarily be motivating the decision to bring federal charges. At times, individual cases may be deemed worthwhile uses of federal resources if particularly dangerous or egregious (though purely intrastate) conduct is involved. American Bar Ass'n 34-35; Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L. J. 979, 1001 (1995). Additionally, ambitious prosecutors might pursue federal charges in "highly visible" cases regardless of whether the impact on interstate commerce is any greater than in "less glamorous" incidents. American Bar Ass'n 26.

At times, when Hobbs Act prosecutions are not restricted to those robberies substantially affecting interstate commerce, defendants may be selected to face federal charges essentially at random—such as when federal prosecutors agree to take cases in order to help their overburdened colleagues at the state level. Beale 1001 n.92. Yet the decision to bring federal Hobbs Act charges rather than state robbery charges is not merely a reallocation of work between two lawyers. "A citizen prosecuted for a state crime is subject to a set of consequences appreciably different than one prose-

cuted for a federal crime": different procedural and evidentiary rules apply, different officers investigate, different accountability mechanisms rein in prosecutors, and different trial judges will preside over—and different appellate judges review—the trial proceedings. American Bar Ass'n 29. While the existence of overlapping systems of prosecution will inevitably lead to some disparities in treatment for defendants subject to parallel charges, those disparities are tolerable when "carefully considered, principled, and limited in amount," *id.* at 32, rather than "a kind of cruel lottery" with no relation to culpability, Beale 997.

Most notably, "defendants prosecuted in federal court receive significantly different—and usually higher—sentences than they would have if they, like many others, had been prosecuted for the same conduct in state court." Beale 996. The Hobbs Act itself authorizes sentences of up to twenty years' imprisonment. 18 U.S.C. § 1951(a). Ohio law, however, provides for sentences of only three to ten years for first degree felonies, including aggravated robbery. Ohio Rev. Code Ann. §§ 2929.14(A)(1), 2911.01(C). Selecting some defendants accused of robberies to face federal charges when their crimes caused no substantial impact on interstate commerce therefore risks undermining one of the tenets of federal sentencing policy—"the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Seeking tougher sentences may at times motivate federal prosecutions of crimes that would otherwise simply be state matters. Limiting Hobbs Act prosecutions to robberies with a discernable effect on interstate commerce, as the Constitution requires, thus also serves the "important purpose of preventing forum shopping,"

Rumsfeld v. *Padilla*, 542 U.S. 426, 447 (2004), a vice no less objectionable when it is committed by prosecutors, *see, e.g.*, *United States* v. *Johnson*, 323 U.S. 273, 275 (1944).

The Court should therefore grant the petition and clarify that when non-economic activity is criminalized pursuant to Congress's Commerce Clause powers, some real impact on interstate commerce is necessary to justify a federal prosecution. Otherwise, only prosecutorial discretion is left to ensure that federal charges are brought only in cases where they would vindicate the federal interest in protecting interstate commerce.

CONCLUSION

Because the Sixth Circuit's decision conflicts with *Raich* and *Morrison*, thereby allowing the Hobbs Act and other federal statutes to reach conduct falling outside Congress's Commerce Clause authority, the petition for review should be granted.

Respectfully submitted.

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